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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1235

DONALD WAKEFIELD SMITH,
Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF AND MOTION TO DISPENSE WITH PRINTING THE RECORD.

WM. A. GALLAGHER,
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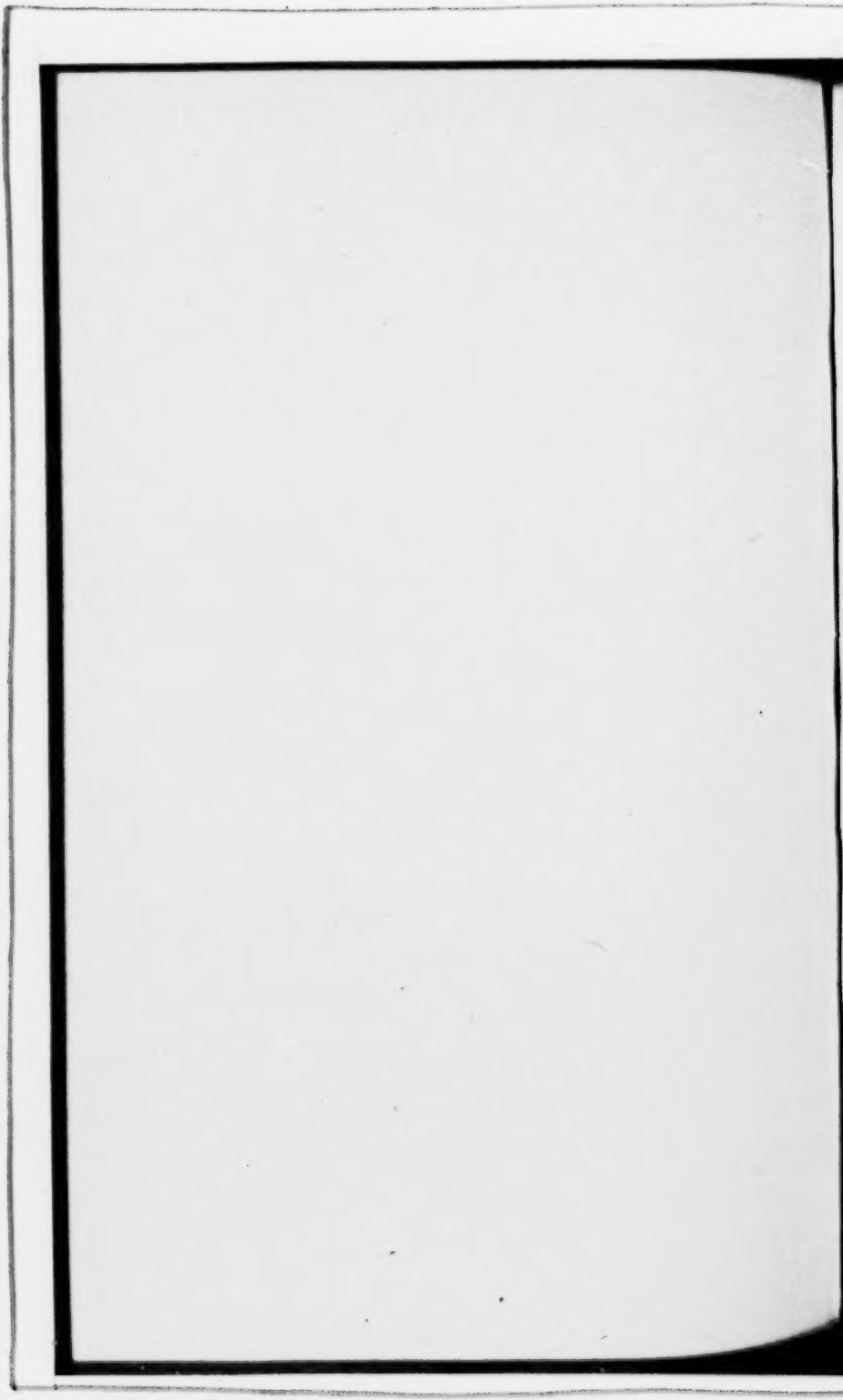

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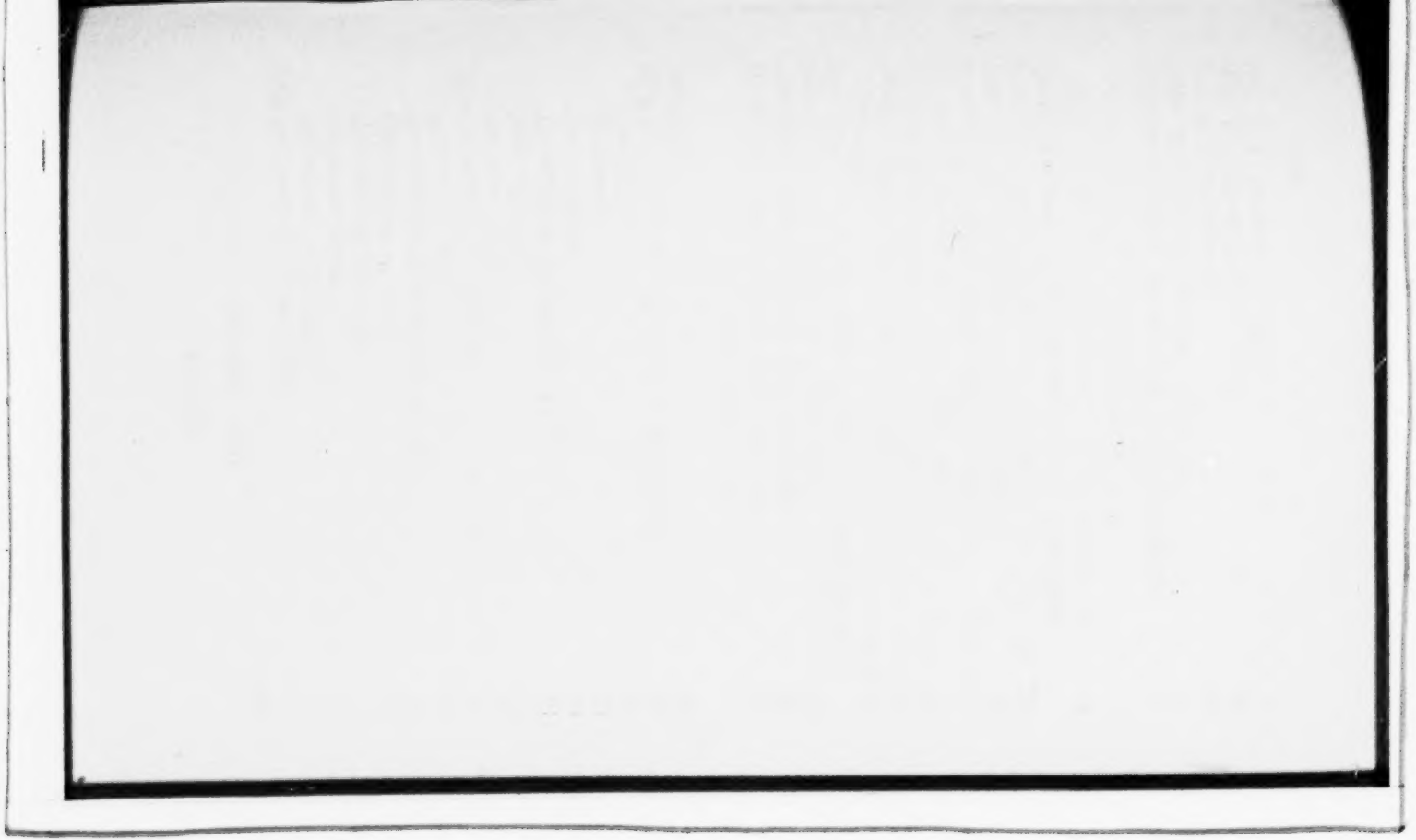

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1235

DONALD WAKEFIELD SMITH,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petitioner, Donald Wakefield Smith, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals of the District of Columbia entered in this case on January 13, 1947.

Statement of Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, 28 U. S. C., Section 347(a), and by Sections 687, 688, Title 18, U. S. C., and the Rules of Criminal Procedure adopted thereunder, particularly Rule 11.

The United States Court of Appeals for the District of Columbia affirmed the conviction of this petitioner in a

decision filed January 13, 1947. Thereafter a petition for rehearing was filed by the instant petitioner, Donald Wakefield Smith, which was denied February 20, 1947. This petition is filed within the time allowed by statute and by rule of Court.

In the Court of Appeals below this petitioner appealed upon a record composed of the typewritten transcript of testimony and the original exhibits and documents offered at the trial in the District Court, all of which were filed in the Court of Appeals with the approval of that Court. There is no printed record. The appeals of the petitioner, Donald Wakefield Smith, James M. Curley and James G. Fuller were consolidated for argument in the United States District Court of Appeals for the District of Columbia, although each had taken a separate appeal from the judgment of the District Court, the appeals were argued at the same time, and the United States District Court of Appeals rendered only one opinion, affirming, as to each, the judgment of conviction in the District Court (App. 26).

Opinions Below

There was no written opinion rendered in the District Court. However, the trial judge, as will appear in the transcript of record (p. 3903), in rendering judgment stated for the record as follows:

> "Frankly, I want an appeal in this case. I have told counsel, though I have acted to the best of my judgment and ability, I appreciate the fact that there are some rulings as to which other men may differ; and in view of that, I much prefer that other jurists as competent or more so than myself take this record and pass upon it before the defendants actually suffer any punishment I have imposed."

The Appellate Court was divided in its opinion with Mr. Justice Prettyman and Mr. Justice Edgerton writing the

majority opinion, and Mr. Justice Wilbur K. Miller dissenting. The dissenting opinion, in terms, referred specifically only to the defendant, James M. Curley, whose petition for certiorari is now pending in this Court; but what is said in that dissent is so emphatically applicable to the present petitioner, Smith, that he cannot in justice be denied the force of its rationalization. This is true not only with respect to the references in the dissent to the poverty of evidence, but also with respect to the refusal of the District Court, and the refusal of the majority of the Court of Appeals, to follow the opinion in *Hammond* vs. *U. S.*, 75 U. S. App. D. C. 397; 127 F. (2d) 752, which refusals give rise to the principal assertion of error in this cause. The division in the Court of Appeals manifested by the dissenting opinion of Mr. Justice Wilbur K. Miller is recognized in the majority opinion of that Court; and not recognized merely as a local cleavage but as one in which the Court of Appeals, by the majority opinion in this case, puts itself at odds not merely with the dissent of Mr. Justice Miller, but with the respectable authority of the Second, Third, Eighth and Tenth Circuit Courts of Appeal in the United States, as well as with its own prior opinion in the *Hammond* Case, *supra*. The opinion was also at odds with the forcible opinion of Mr. Justice Harold M. Stephens, a member of the same Court of Appeals, but not one of the justices who heard and decided this case (*U. S.* v. *U. S. Gypsum Company*, 51 F. Supp. 613, at 628-633). This recognition is found in the language of the majority at page 8 of the opinion:

> "It is only fair to say that the view which we take is perhaps at variance with the views which have been taken by some of the Circuit Courts of Appeals."

Summary of the Case

The judgment of the United States Court of Appeals for the District of Columbia sought to be reviewed was in affirmation of the District Court conviction of James M. Curley, James G. Fuller, and Donald Wakefield Smith, petitioner herein, under an indictment laid in sixteen counts. James M. Curley was found guilty as charged on counts 1 through 9 inclusive, and on count 16. James G. Fuller was found guilty on counts 1 through 9 inclusive, count 11, and counts 13, 14, 15 and 16. Donald Wakefield Smith was found guilty on counts 11, 13, 14, 15 and 16. Such was the judgment entered by the Court. Tabulated the judgment might be visualized as follows:

Indictment Count	Defendants Curley	Fuller	Smith
1	Guilty	Guilty	—
2	Guilty	Guilty	—
3	Guilty	Guilty	—
4	Guilty	Guilty	—
5	Guilty	Guilty	—
6	Guilty	Guilty	—
7	Guilty	Guilty	—
8	Guilty	Guilty	—
9	Guilty	Guilty	—
10	—	—	—
11	—	Guilty	Guilty
12	—	—	—
13	—	Guilty	Guilty
14	—	Guilty	Guilty
15	—	Guilty	Guilty
16	Guilty	Guilty	Guilty

The purpose of the foregoing tabulation is to call to the attention of the Court the clear-cut line of demarcation which runs across the face of the judgment through count 10 of the indictment.

Count 1 of the indictment charges a scheme to defraud by the use of the mails. The scheme is alleged to have extended from June 20, 1941 through February 28, 1942; that the scheme was continuous and was participated in by the three above-named defendants and four other defendants, namely, Underwood, Fitzgerald, Hall and Desmond. At the time of the trial Fitzgerald had died. Hall and Underwood were acquitted by direction of the Court, on all counts. Desmond was granted a severance.

On Count 1 the defendant Smith was acquitted by direction of the Court, although this count alleged the same scheme to defraud charged in count 16 as a conspiracy to use the mail, covered the same period of time, included the same defendants, and was supported by the same evidence. The evidence under the first count being considered insufficient by the Court at the end of the trial, the Court properly directed a verdict of not guilty as to Smith; but permitted the case to go to the jury upon the sixteenth count, upon the same evidence.

The line of demarcation above referred to is a line of double-emphasis; it divides the indictment both chronologically and as to the type of activity charged against the defendants. With respect to time the indictment is laid in chronological sequence from the date of June 20, 1941 through December 6, 1941 which period embraces the first nine counts of the indictment. On count 10 a directed verdict was entered as to all defendants. This group of charges covered what were referred to as *construction contracts,* and the *corporate organization* of the Engineers' Group, Inc. From the evidence and from the verdicts of *not guilty* as to Smith it cannot be questioned that with these matters he had no connection, nor knowledge or participation. The trial court in its charge to the jury with respect to count 9, the only one of this group of counts

which the court permitted to go to the jury, laid down the following rule (R. 3742):

> "In behalf of the defendant Smith, I also charge you, concerning his alleged participation in the offense stated in count 9, that to find him guilty thereunder you must believe beyond a reasonable doubt that at the time that act is laid—December 6, 1941—Smith had in fact joined the alleged criminal group with knowledge of its fraudulent design and purpose."

The response of the jury to this charge was to find the petitioner Smith not guilty under count 9; in other words the jury did not believe that on December 6, 1941 (the date covered by the ninth count), "Smith had in fact joined the alleged criminal group with knowledge of its fraudulent design and purpose." In the entire charge, this was the only place where the trial Court differentiated between one defendant and another.

The counts on which Smith was adjudged guilty begin with the date of January 13, 1942, and carry through to February 28, 1942 and deal with matters and things entirely divorced from the first group of counts, until we come to the sixteenth count which is the catch-all conspiracy count. The conspiracy count, however, recognizes the breaking of the case into two segments, because by incorporation it adopts the division of the alleged scheme or conspiracy into what was shown by the evidence to amount to two entirely separate groups of transactions, unlike in their nature, method and purpose.

The jury trial in the District Court began November 27, 1945, and on January 17, 1946 the jury received the charge of the trial justice (R. 3731-3749). The actual charge covered thirteen pages of the stenographic transcript, averaging twenty-four lines per page.

The charge itself was in sweeping and general terms. There was no attempt to particularize nor to individualize

each defendant in his relation to the other defendants. There was no attempt to instruct the jury with regard to the separate counts of the thirty-page indictment. The Court (R. 3735), characterized its own charge as follows:

> "Please understand that this is only an attempt to summarize quickly that part of the alleged scheme which I understand the Government contends has been proved; for a complete and accurate understanding, you must return to the indictment itself."

With respect to the sixteenth count, the conspiracy count, the instruction of the Court was vague, general, and erroneous.

> "Under this count, before convicting any defendant thereon, the proof must lead beyond a reasonable doubt to your belief that *at least two of them* are guilty of conspiring; otherwise, all must be acquitted, for one cannot conspire with himself" (R. 3739).

And again (R. 3740), the Court in its charge on conspiracy, enunciated in the broadest general terms the following rule, without that particularization required to safeguard each defendant.

> "Hence, it is not necessary that all defendants actually take part in unlawful acts in furtherance of the conspiracy *or to know about the same.*"

The jury was thus left with the equivocal enunciation that it was not necessary for the defendants to "know about the same," the latter phrase referring apparently to "all defendants," knowing about the conspiracy.

Continuing, the instruction went on (R. 3740)—

> "So it is I instruct you that if the alleged conspiracy is found from the evidence to have existed, then the acts and declarations of each party shown to be a conspirator in furtherance thereof may be considered

by the jury in determining the guilt of others who are accused. But until and unless a conspiracy is shown otherwise, the declarations of one defendant cannot be considered as proof against another defendant of his participation in the conspiracy; nor can such declarations be considered against another defendant if they are made after the conspiracy has ended. When so made, they must only be considered as against the one who made them."

This part of the charge is particularly defective with respect to the defendant Smith when considered in relation to Government Exhibits 173-D and 173-E, and the admission into evidence of a transcript of testimony taken from the defendant Curley in a proceeding in Boston, on December 15, 1941. This document was admitted upon the theory that it was an admission linking the defendant Curley in some way with the charge in the indictment. The period of time covered in the Curley testimony was long prior to any connection that Smith had or could have had with the Engineers' Group, Inc. The testimony was taken *ex parte* and nowhere did it appear that Smith knew anything whatever about the Massachusetts proceeding, the taking of the testimony of Curley, nor the matters referred to in such testimony. The evidence was admissible, if at all against Curley alone, but no part of the Court's charge to the jury attempted to deal with, or to particularize, this evidence

The transactions referred to in the transcript of Curley's testimony, referred to above, were oriented in time in August, 1941, long prior to any time when Smith, from the evidence, even knew of the existence of the Engineers' Group, Inc. Yet the jury was not instructed, at all, as to the limitations with which this testimony should be received nor its inapplicability to the defendant Smith. The transcript referred to is at page 3177 of the record.

So too with respect to testimony relating to the defendant Fuller's conduct long after petitioner Smith had severed all connections with the enterprise (R. 832).

At the appropriate time, and relying upon the decision of the United States District Court of Appeals in the District of Columbia in *Hammond* v. *U. S.*, 75 App. D. C. 397, 127 F. (2d) 752 and the rule of law announced in four of the Federal Circuit Courts of Appeal, a motion for directed verdict was presented to the Court on behalf of this petitioner. At that time the Court (R. 2941), refused to follow the plain mandate of the *Hammond* case, a *per curiam* decision of the Federal Appellate tribunal, the decision of which required mandatory recognition on the part of the trial court; the trial court in fact stated that the rule of law to be applied "was *not what the court says it is" in the Hammond decision.* When it is considered that the decision in the *Hammond* case was a *per curiam* decision, in which the Chief Justice, Mr. Justice Groner, of the United States Court of Appeals for the District of Columbia, and Mr. Justice Rutledge, then a member of that court, and now one of the Justices of this Court to whom this petition is addressed, *concurred,* the rejection of the decision by the trial court was palpable error.

The indictment charged and the evidence established that the prosecution was based on the activities of a group of persons designated as the Engineers' Group. The group formed a corporation under the laws of Massachusetts in June, 1941, the corporate name adopted being Engineers' Group, Inc. Smith took no part in this matter and so far as the record shows knew nothing of its activities or the activities of its officers or agents until December, 1941. During the period following incorporation its activities concerned themselves with various construction contracts and enterprises which are referred to in the first count of

the indictment, and in the succeeding counts to count 10. If there was a conspiracy of any sort afoot during that period of time, the instruction of the court as to count 9 and the verdict of the jury finding Smith not guilty on those counts demonstrates he had no participation in such conspiracy. The evidence given by numerous prosecution witnesses, and a large mass of documentary evidence admitted, was let go to the jury by the trial court without any attempt to safeguard Smith from the effect of such evidence. During that period of time, and up until December 16, 1941, when Smith was elected to the Office of Treasurer of the Corporation, numerous persons had participated in the transactions of the corporation as officers and agents. According to the evidence Robert G. Thach was General Counsel, Director, and sometimes Secretary. Everett R. Hurt was a Director, and Treasurer of the Corporation handling its funds up to Deecmber 16, 1941. The charge of the trial court to the jury with respect to the defendant Smith did not at any time safeguard him so that the conduct of these persons would not be imputed to him.

During the trial a group of exhibits were offered on behalf of this petitioner under circumstances to which the United States Court of Appeals Below referred as follows:

> "In view of all the circumstances • • • we think that if the exclusion of these exhibits had affected the substantial rights of Smith, the action of the court might have constituted reversible error. Whether his substantial rights were affected depends upon the nature of the documents."

To mention only one of these exhibits (Smith Ex. No. 15) an examination demonstrates the importance of it to Smith. It is strong documentary proof that Smith did not know until shortly before his resignation of the true financial condition of the Corporation. The Court of Appeals in its

opinion had already said, "He was shown to have knowledge of the state of the finances." (Op. page 11) The exclusion of the exhibit, therefore, did affect the substantial rights of the petitioner. In its opinion again, at page 12, the Appellate Court says, "Counsel had full opportunity," with respect to a witness identifying one of the exhibits, "to draw from him the full measure of his exoneration of Smith." The record does not permit any inference that Counsel was permitted such cross examination. The Court of Appeals itself recognizes that it was not allowed. At page 11 of the opinion the court said respecting these same exhibits:

> "From time to time during the presentation of the Government's evidence, counsel for Smith, in cross examination, presented the witnesses with documents which they identified. At one point Government counsel objected to this procedure on the ground that Smith was thereby making the witness his own witness, and that he could not introduce his own evidence in the course of cross examination. The court said, however, that in the interest of expedition he would permit a witness to identify a document while he was on the witness stand, although *he would not let counsel for Smith pursue the matter beyond that point during the course of cross examination.*"

It was one of the grounds of error assigned upon the appeal that the trial court had by rulings such as the foregoing denied the petitioner Smith the right of crosss examination, not only with respect to these exhibits but with respect to the testimony of almost every witness.

In the twelve-page opinion of the Appellate Court all of the evidence against Smith is summed up as follows:

> "Appellant Smith shows that he came into the organization late and left soon thereafter, being treasurer of it for only two months. He shows that he had difficulty in getting possession of the books and did

not actually get them for a month. But the record indicates his activity in connection with the organization before he was treasurer, and he was an actual participant in the negotiation of several of the contracts with customers. He was shown to have knowledge of the state of the finances. We think the evidence sufficient to send the case to the jury and to sustain the verdict."

The foregoing is the sum total of what that court found in the record as to Smith. The record *does not* contain any evidence sufficient to support the conclusion that Smith was active in connection with the organization before he was treasurer. It does establish that whatever activity he engaged in, which could possibly bear upon any of the charges in the indictment took place during the short two months that he acted as treasurer. The exhibits offered on his behalf but excluded, and especially Smith Exhibit No. 15, referred to above, demonstrate that he did not have knowledge of the state of the finances until February 13, 1942, and his resignation on February 16, 1942, the following Monday, resulted. So too of Smith Exhibit No. 19 which was excluded. That exhibit was a documentary demonstration that during his period as treasurer Smith handled the funds which came into his hands as treasurer under the specific direction and instruction of Fuller, who was the Executive Vice President of the Corporation from its inception.

The evidence further showed that Smith was the victim of misrepresentation on the part of Fuller, as to the financial condition of the Corporation, during his term as treasurer, as shown by Government Exhibit 163 purporting to be a valid deposit slip, which proved to be, as Smith later found out, a deposit of a check for $3,750.00, endorsed by Fuller, upon which payment had been stopped

without notice to Smith or to the auditor, J. L. Davis. (R. 1502-1504)

With respect to the statement of the Appellate Court that Smith was an actual participant in the negotiation of several of the contracts with customers, the record shows the only customers with whom Smith could have possibly had negotiation were those who had dealings with the Corporation after December 16, 1941. These were three in number, The Advertising Metal Display Company, the Norcor Corporation and the Forse Corporation. With respect to the Advertising Metal Display Company and the Norcor Manufacturing Company the record is unimpeachable that Smith had nothing whatever to do with any negotiations concerning those companies(R. 2657-8; 2666), (R. 837 and 840).

With respect to the Forse Corporation, the testimony of Harry Donald Forse, president of the Forse Corporation (R. 1318) and John L. Hamilton, a representative of the Forse Corporation, (R. 1373, 1374, 1375, 1378) established that they were present at, and handled, all negotiations relating to their contract with Engineers Group, Inc. They were unanimous in stating that Smith did not participate in the negotiation of such contract, Smith never recommended the Engineers Group, discussed any contracts, nor made any representations to anyone concerning Engineers Group, who was connected with it, or what they could do (R. 1374, *et seq.*).

The Appellate Court was demonstrably in error in concluding then that Smith was active with the organization before he was treasurer, and that he was an actual participant with respect to the negotiation of several of the contracts with customers.

Questions Presented

1. Did the Appeals Court err in refusing to recognize the rule of law laid down in *Hammond* vs. *U. S.*, 75 App. D. C. 397; respecting the function of a District Court judge in the trial of a criminal case and in sustaining a conviction of the petitioner in a trial where the District Court also refused to follow that ruling?

2. Did the Appeals Court err in sustaining the conviction of the petitioner when the instructions given to the jury by the trial court did not follow the rule laid down in *Kotteakas, et al.*, v. *U. S.*, U. S. Supreme Court, decided June 10, 1046; in that the instruction failed to segregate this petitioner from the mass of defendants, failed to instruct the jury that they must consider the case as to each defendant separately, and failed to particularize in its instruction as to the evidence relating to this petition; and failed to safeguard this defendant against an unwarranted imputation of guilt from others' conduct and from loss of identity in the mass?

3. Did the Appeals Court err in sustaining the ruling of the Court Below as to exclusion of appellant's documentary exhibits?

4. Did the Appeals Court err in sustaining the action of the District Court in overruling the motion of this petitioner for a directed verdict, regardless of whether or not the action of the court in refusing to follow the *Hammond* case was error, in view of the nature of the evidence against this petitioner and of the ruling in *Isbell* vs. *U. S.*, 227 Fed. 788, 792 (C. C. A. 8th, 1915)?

5. Did the Appeals Court err in disregarding the errors relied upon by this petitioner in his appeal, especially

since these errors were not technical in nature and did affect the substantial rights of this petitioner?

Reasons for Allowance of the Writ

1. The decision herein sustains a conviction under an instruction which constituted fundamental error.

2. The decision herein misconstrues the rule enunciated in the *Hammond* case, *supra*, as well as enunciated and approved in The Eighth Circuit, in *Gargotta* v. *United States*, 77 F. 2d 977 (1935), the Third Circuit, in *Nicola* v. *United States*, 72 F. 2d 780 (1934), *Grant* v. *United States*, 49 F. 2d 118 (1931), and *Graceffo* v. *United States*, 46 F. 2d 852 (1931), the Tenth Circuit, in *Parnell* v. *United States*, 64 F. 2d 324, 329 (on rehearing, 1933), and *Leslie* v. *United States*, 43 F. 2d 288 (1930) (see concurring opinion), and the Second Circuit, in *Nosowitz* v. *United States*, 282 Fed. 575 (1922), and *Romano* v. *United States*, 9 F. 2d 522 (1925), seem to have taken a view different from ours.

3. The decision herein is at variance and in conflict with the *Kotteakos* case, *supra*.

Wherefore petitioner prays that the Writ of Certiorari be issued out of and under the seal of this Honorable Court to the United States Court of Appeals for the District of Columbia, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the proceedings of said Court herein, being the cases numbered and entitled in its docket as "*Donald Wakefield Smith*, Appellant, v. *United States of America*, Appellee, No. 9209" and that the judgment of said Court

be reviewed by this Court, and for such other relief as to this Court may seem proper.

Dated April 11, 1947.

DONALD WAKEFIELD SMITH,
Petitioner.

WM. A. GALLAGHER,
WM. B. O'CONNELL,
Attorneys for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1235

DONALD WAKEFIELD SMITH,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

BRIEF IN SUPPORT OF PETITION

Statutes Involved

The Statutes involved are Title 18, Section 388, U. S. Code, commonly known as the mail fraud statute. Under this section the first fifteen counts of the indictment are laid.

The sixteenth count is laid under Title 18, Section 88, U. S. Code, commonly known as the conspiracy statute.

The Indictment

The indictment was returned on January 3, 1944. *The* charges in its first 15 counts that James G. Fuller, Donald Wakefield Smith, James Barton Underwood, James M. Curley, Marshall J. Fitzgerald, Bert Hall and David E. Desmond, participated in a scheme to defraud by use of the United States mails. It covers a period from June 20, 1941

through February 28, 1942 and says that the defendants devised and intended to devise a scheme and artifice to defraud certain named persons and corporations by taking from them money, property, and other things of value. The first count covers sixteen phases of the record (R. pgs. 3907 through 3922). The first count is the usual mail fraud count charging that the defendants would induce the persons named to believe that the defendants could and would cause two classes of contracts to be procured; (1) construction contracts, and (2) manufacturing contracts, and would procure engineering services necessary for the execution of said contracts. The overt act alleged under Count 1 is the mailing of a letter by the defendant to one F. M. Gifford at Worcester, Massachusetts on September 7, 1941. The subsequent counts of the indictment through the fifteenth count, incorporate by reference the allegations in the first count, except that the later counts set forth in each count, a separate mailing.

The sixteenth, the conspiracy count, charges all of the persons named in the first count including Smith with having conspired from June 20, 1941 to February 28, 1942 in the District of Columbia and elsewhere to violate Section 338, Title 18, U. S. Code, and then adopts by reference the allegations of Count 1 of the indictment (R. 3947).

The Motions Antedating the Trial

This petitioner prior to trial filed motions for bill of particulars; to quash the indictment on the ground that it had been illegally procured; to inspect the Grand Jury records; and to compel the prosecution to elect to proceed either on the 15 substantive counts or on the 16th count charging conspiracy (R. pp. 3957, 3958, and 3966). All motions were overruled (R. pp. 3972, 3973, and 3974).

Upon the opening of the trial, there were before the Court the following defendants: Fuller, Smith, Underwood,

Curely, and Hall. The defendant Fitzgerald had died, by then. Hall's presence was excused. A showing was made on Desmond's behalf that a critical illness prevented his appearing in Court and he was granted a severance. By the end of the trial both Hall and Underwood had been removed from the case by direction of the court; thus upon Fuller, Smith, and Curley fell the concentrated onus of all of the charges in the indictment, and all of the evidence, even the evidence introduced concerning the defendants acquitted by direction of the Court or severed from the case.

The Evidence

The appellant, Donald Wakefield Smith, was a practicing attorney in the District of Columbia for many years. He also practiced law in Pennsylvania, maintaining an office there. He was well and favorably known as an attorney in a great many other States. He had been a member of the National Labor Relations Board, appointed by the President and confirmed by the Senate of the United States. After the termination of that service he again entered private practice, although not in general practice. His character according to the testimony of numerous witnesses was irreproachable.

The record shows him to have been suffering from deafness, almost total, so that a radio speaker had to be placed at the trial table during the trial of the case to enable him to follow the testimony (R. 113).

His first connection in any way with the Engineers' Group, Inc., came in December of 1941. On December 16, 1941, he was elected to the Office of Treasurer of the Engineers' Group, succeeding Everett R. Hurt. On February 16, 1942, he resigned as Treasurer of the Engineers' Group and terminated all connection with that corporation. J. L. Davis, an Auditor employed by the Engineers' Group, testified (R. 481) that after Smith became Treasurer in De-

cember he, Davis, undertook to set up books for the Engineers' Group but encountered great difficulty in doing so because Everett L. Hurt, the prior treasurer, had the records of the corporation in his possession; that he eventually got the records from Hurt sometime during the month of January, 1942, and then made up a set of books as best he could. One of these books is in evidence as Government's Exhibit No. 108.

The testimony of Arthur E. Schumacher, President of the Norcor Manufacturing Company at page 823 of the record and through page 840 concludes with the statement that he never saw Donald Wakefield Smith in person. Harold E. Fuller, Secretary of the Norcor Company testified that the only transaction he ever had with the Engineers Group, Inc., took place with James G. Fuller in February of 1942 (R. 969).

The foregoing is all of the testimony of any witness concerning the Norcor Corporation, one of the three corporations with whom Smith could possibly have had any transactions.

The testimony of Major C. G. W. Anderson, of Advertising Metal Display Company, the second of the three enterprises with whom Smith could have had any negotiations testified that Smith was not present at any time during the negotiation of any contract with the Advertising Metal Display Company (R. 2657-58; 2666).

The testimony of Donald Forse of the Forse Corporation (R. 1318) and of John L. Hamilton, a representative of the same corporation (R. 1373, 1374, 1375 and 1378) established that they were present at and handled all negotiations relating to their contract with Engineers Group, Inc. They were unanimously stating that Smith did not participate in the negotiation of such contract, that Smith never recommended the Engineers Group, discussed any contracts

nor made any representations to anyone concerning Engineers Group.

The testimony of Forse and Anderson establishes that the money given to the Engineers Group in the interest of those corporations was given with the knowledge and expectation that it would be used as the Engineers Group saw fit. Forse testified (R. 1291 and R. 1354) that the money "of course was given to their company and could be used as they saw fit,"—and that he thought that the Engineers Group "tried hard." He further stated that he had never made any complaint and knew "that they were using money every day in their work."

Anderson of the Advertising Metal Display Company, and the only witness in connection with that company's contract testified (R. 2678), "we paid the money over to them and how they used it would really be up to them to determine, not for us." He further testified (R. 1291 and 1357) that the money could be used by the Engineers Group for operating expenses; that he was satisfied that the Engineers Group was making an honest and sincere effort to produce contracts and were doing the best they could.

None of the other witnesses adduced by the prosecution, remembered Smith, could identify him, or could testify as to any material matter involving him.

He signed no letters, mailed no letters, executed no contracts; he did not know so far as the record shows of any brochures, advertisements or financial statements, and is not shown to have made any misstatement of any material facts, or to have known about any such misstatement.

He received no monies from the group except reimbursement for monies advanced by him and is still owed from the corporation more than $1,000.00 for monies so advanced. Engineering services were supplied (R. 1824 thru 1877). Contracts were proffered (R. 847-914-998), and throughout the record.

Argument

1. The Court Below erred in sustaining the judgment of conviction based upon the refusal of the court to recognize the rule in *Hammond* v. *U. S.*

2. The Court Below erred in sustaining the conviction because of the failure of the trial court properly to instruct the jury under the rule laid down in the *Kotteakas* case, *supra.*

3. The Court Below erred in sustaining the trial court in excluding petitioner's documentary evidence.

4. The Court Below erred in sustaining the judgment of conviction and the action of the District Court overruling petitioner's motion for directed verdict.

5. The Court Below erred in disregarding the errors relied upon by this petitioner in his appeal.

At the time of the decision in the Court of Appeals below the court had called to its attention the opinion of Mr. Justice Rutledge in the *Kotteakas* case, in which this Court had with great particularity set forth the protection which must be accorded a defendant charged under an indictment such as the one here involved. The Appellate tribunal, however, made no mention of nor reference to the *Kotteakas* case in its opinion. It is apparent upon a reading of the charge of the District Court Judge to the jury that at least so far as the petitioner Smith is concerned the rule laid down in the *Kotteakas* case was not adhered to. The charge was most general in character and made no attempt whatever to distinguish between the position which he occupied as compared to the other defendants. Without quoting at length from the case relied upon here it is sufficient to say that the Kotteakas opinion required great particularity on the part of the judge charging the jury, and

is not satisfied by a general charge such as that given in the present case.

The Court of Appeals Below recognized that its opinion was in conflict with the opinion of four of the United States Circuit Courts of Appeals, and well as a reversal of its own opinion in the *Hammond* case, *supra,* which required that the trial court, under the rule of law there laid down instruct the jury in favor of this petitioner on all counts.

Conclusion

The writ of certiorari should be granted.

Respectfully submitted,

Wm. A. Gallagher,
Wm. B. O'Connell,
Attorneys for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1235

DONALD WAKEFIELD SMITH,
Petitioner,

vs.

UNITED STATES OF AMERICA

MOTION TO DISPENSE WITH PRINTING THE RECORD HEREIN

The Petitioner, Donald Wakefield Smith, moves this Honorable Court to dispense with the printing of the record herein on application for the writ of certiorari, for the reason that the transcript is of such proportions that printing it would be of tremendous expense, and that the portions of the record material to this application constitute only a small proportion of the same, and the material portions can be printed as an appendix to the brief herein.

The said record in the United States Court of Appeals for the District of Columbia was by order of the Chief Justice, filed in original without printing.

Respectfully,

WM. A. GALLAGHER,
WM. B. O'CONNELL,
Attorneys for Petitioner.

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[Stamp:] United States Court of Appeals for the District of Columbia. Filed Jan. 13, 1947. Joseph W. Stewart, Clerk.

APPENDIX

UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA

No. 9208

JAMES M. CURLEY, *Appellant,*

v.

UNITED STATES OF AMERICA, *Appellee*

No. 9209

DONALD WAKEFIELD SMITH, *Appellant,*

v.

UNITED STATES OF AMERICA, *Appellee*

No. 9215

JAMES G. FULLER, *Appellant,*

v.

UNITED STATES OF AMERICA, *Appellee*

Appeals from the District Court of the United States for the District of Columbia

Argued June 6, 1946. Decided January 13, 1947

Mr. William E. Leahy, with whom Mr. Nicholas J. Chase was on the brief, for appellant in No. 9208.

Mr. William A. Gallagher for appellant in No. 9209.

Mr. T. Emmett McKenzie for appellant in No. 9215.

Mr. William A. Paisley, Special Assistant to the Attorney General, with whom Mr. Edward M. Curran, United States Attorney at the time the brief was filed, was on the brief, for appellee. Mr. Sidney S. Sachs, Assistant United States Attorney, also entered an appearance for appellee.

Before Edgerton, Wilbur K. Miller and Prettyman, JJ.

PRETTYMAN, J.:

Appellants were indicted for violation of the mail fraud statute [1] and for conspiracy to violate that statute.[2] Trial was had before a jury. At the conclusion of the case for the prosecution, the defendants moved for directed verdicts of acquittal. The court denied the motions. Defendants Curley and Fuller stood on the motions and offered no evidence. Defendant Smith presented eight character witnesses and proffered certain documentary evidence. These three defendants were convicted on the conspiracy count. They were acquitted on some of the substantive counts and convicted on others. The appeals were consolidated for argument.

The evidence can be skeletonized for present purposes. There was an organized group, called Engineers' Group, later incorporated. The membership in the Group was identified, consisting, so far as here material, of its officers. Certain activities were carried on in the name of the Group, and the mails were used in furtherance thereof. Those activities included the negotiation and execution of contracts with manufacturing and construction concerns and the receipt of money from those concerns. The contracts related to the procurement of government war work and housing construction, and the furnishing of engineering and similar service in connection with that work. In the negotiation of the contracts, representations were made in the name of the Group as to business controlled by it, its staff, its assets, and the existing status of various government projects. The money was received by the Group under agreements that it be held as deposits and returned if contemplated business projects did not materialize.

The representations were false, and the agreements were not kept, except that three refunds were made from funds paid in by other people. The Group was represented as having within its control the designation of contractors on certain government housing projects and war work. It had

[1] 18 U. S. C. A. § 338.

[2] 18 U. S. C. A. § 88.

none. Its staff was represented as large and experienced. It was not. It was represented as having large amounts of cash in bank and extensive security holdings. It had no such amounts or holdings. Certain housing projects were represented as having been approved by the Federal Housing Administration. They had not been. Commitments on financing were represented as having been made by financial institutions on certain projects. No such commitments had been made. These various representations were inducements for the contracts made by the Group with its customers or clients. They were made verbally, in letters, in contract agreements, and in a brochure widely distributed. The money received as deposits was not held but was spent as received.

The representations above described, or some of them, were made to every concern with which the Group concluded a contract, and to others with whom no contracts were concluded. The money received as deposits was the only money the Group ever received. No money was paid in to it as capital, although the corporation's financial statements indicated outstanding stock in the amount of $20,000; and none was loaned to it by its owners or otherwise.

Engineers' Group began activities in June or July, 1941, and was incorporated in October of that year. The venture disintegrated in February, 1942, with overdrafts at the bank, unpaid wages to employees, and other unpaid bills. About $67,000 [3] had been received from customers and about $9,600 refunded to them.

The representations made in the name of the Group were usually made by appellant Fuller, its vice president. The contracts were in large part negotiated by Fuller, and all were executed by him. The office was managed by him, and he controlled the disposition of the funds on hand. He withdrew about $18,000 "in checks to himself or otherwise."

Appellant Curley was president of the Group from June 26, 1941, and of the corporation from its incorporation until

[3] The account book (Ex. 108) shows $5,000 received November 6 and 7, 1941, from Fells Plumbing and Heating Company, and $2,500 "check returned" to that Company November 19th. No explanation of the items appears elsewhere. We include $2,500, the indicated net receipt, as received from this Company.

his resignation about the middle of December, 1941. He introduced several customers, or clients, to Fuller, with statements such as that Fuller, "our man in Washington," had a project that was all ready to materialize, all ready to go; and "Mr. Fuller is our man who handles the details of these matters"; and "this group had several jobs and several contracts and they needed contractors to do them." Curley at one time sought to secure a "loan" from a bank to the Group, upon an understanding that the amount would remain in the bank as an account in the name of the Group, not subject to withdrawal; and that the bank would advise any inquirer that the Group had that amount on deposit at the bank. Curley knew money was being received by the Group upon condition that it be returned, as at least one depositor invoked his aid in securing a return of his deposit. Curley was frequently at the office of the Group in Washington and upon occasion was in the room while Fuller was discussing possible contracts with customers.

Curley did not execute any contracts. He did not, so far as the record shows, know of the brochure. He signed no letters. Except for the introduction of clients to Fuller and statements of the nature of those which we have quoted, he did not participate in the negotiation of contracts with customers. There is a dispute as to the source of a payment to him of $3,500 in currency, which he used on August 8th to take up the second of two checks signed by one Newcomb, payable to and endorsed by Fuller, which had not cleared. The first money shown by the record to have been received by the Group was not received until August 12th. Curley testified in the Municipal Court of the City of Boston that he had received that amount "from one of the officials of the Engineers' Group," shown to have been Fuller, and that he "worked with them in the development of business." He said that in the transaction he had acted "as a messenger or agent." There is no evidence purporting to show that Curley received any other money from the Group.

The principal point made by appellant Curley is that the trial court erred in refusing to direct a verdict of acquittal as to him. It is not disputed that upon a motion for a directed verdict, the judge must assume the truth of the

Government's evidence and give the Government the benefit of all legitimate inferences to be drawn therefrom. Appellant relies upon statements of this and other courts concerning the tests by which a trial judge must determine the proper action upon the motion. For example, in *Hammond* v. *United States,* 75 U. S. App. D. C. 397, 127 F. 2d 752 (1942), this court quoted from *Isbell* v. *United States*[4] as follows:

> "Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt it is the duty of the trial judge to instruct the jury to return a verdict for the accused, and where all the substantial evidence is as consistent with innocence as with guilt it is the duty of the appellate court to reverse a judgment against him."

It is true that the quoted statement seems to say that unless the evidence excludes the hypothesis of innocence, the judge must direct a verdict. And it also seems to say that if the evidence is such that a reasonable mind might fairly conclude either innocence or guilt, a verdict of guilt must be reversed on appeal. But obviously neither of those translations is the law. Logically, the ultimate premise of that thesis is that if a reasonable mind might have a reasonable doubt, there is, therefore, a reasonable doubt. That is not true. Like many another rule become trite by repetition, the quoted statement is misleading and has become confused in application.

The functions of the jury include the determination of the credibility of witnesses, the weighing of the evidence, and the drawing of justifiable inferences of fact from proven facts. It is the function of the judge to deny the jury any opportunity to operate beyond its province. The jury may not be permitted to conjecture merely, or to conclude upon pure speculation or from passion, prejudice or sympathy. The critical point in this boundary is the existence or nonexistence of a reasonable doubt as to guilt.[5] If the evidence

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[4] 227 Fed. 788, 792 (C. C. A. 8th, 1915).

[5] See discussion in *United States* v. *United States Gypsum Co.,* 51 F. Supp. 613, 628-633 (D. C. D. C. 1943).

is such that reasonable jurymen must necessarily have such a doubt, the judge must require acquittal, because no other result is permissible within the fixed bounds of jury consideration. But if a reasonable mind might fairly have a reasonable doubt or might fairly not have one, the case is for the jury, and the decision is for the jurors to make. The law recognizes that the scope of a reasonable mind is broad. Its conclusion is not always a point certain, but, upon given evidence, may be one of a number of conclusions. Both innocence and guilt beyond reasonable doubt may lie fairly within the limits of reasonable conclusion from given facts. The judge's function is exhausted when he determines that the evidence does or does not permit the conclusion of guilt beyond reasonable doubt within the fair operation of a reasonable mind.

The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal,[6] must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or, to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond reasonable doubt, the motion must be granted. If he concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide the matter. In a given case, particularly one of circumstantial evidence, that determination may depend upon the difference between pure speculation and legitimate inference from proven facts. The task of the judge in such case is not easy, for the rule of reason is frequently difficult to apply, but we know of no way to avoid that difficulty.

To be valid, the first part of the above-quoted statement from the *Hammond* case, *supra*, must be understood to mean that the judge cannot let a case go to the jury unless there is evidence of some fact which to a reasonable mind

[6] Motion for judgment of acquittal under Rule 29(a) of the new Federal Rules of Criminal Procedure.

fairly excludes the hypothesis of innocence. The statement refers to the requisite presence of evidence, and not to the absence or effect of other evidence. The second part of the quoted statement means that if, upon the whole of the evidence, a reasonable mind must be in balance as between guilt and innocence, a verdict of guilt cannot be sustained.

Although this court has made the statement we have quoted, the rule actually applied has been as we now state it. Thus, in the opinion in the *Hammond* case, *supra*, after the quoted sentence, the court went on to say, "In the light of the circumstances we have related, we think it impossible that a jury of reasonable men could have fairly reached the conclusion that appellant, in what he did, necessarily intended to commit rape." And in the *Cady* case,[1] the court said that the quoted rule "is not applicable here, because the facts established are such that the jury was fully warranted in deducing from them inferences which excluded every other hypothesis but that of guilt."

If the judge were to direct acquittal whenever in his opinion the evidence failed to exclude every hypothesis but that of guilt, he would preempt the functions of the jury. Under such rule, the judge would have to be convinced of guilt beyond peradventure of doubt before the jury would be permitted to consider the case. That is not the place of the jury in criminal procedure. They are the judges of the facts and of guilt or innocence, not merely a device for checking upon the conclusions of the judge.

It is said that the accused is presumed to be innocent. That statement is absolutely true, and it is also true that the presumption follows the accused until a verdict has been reached. But persuasion of guilt beyond a reasonable doubt overcomes the presumption. Our whole discussion centers about the function of determining reasonable doubt *vel non*. We hold that it is the jury's function, provided the evidence is such as to permit a reasonable mind fairly to reach either of the two conclusions. We do not in any way impinge upon the presumption of innocence. We find the rule of procedure by which that presumption is overcome.

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[1] *Cady* v. *United States*, 54 App. D. C. 10, 293 Fed. 829 (1923).

The rule as we state it is supported not only by the reasoning we have indicated, but by ample authority.[8]

The confusion which seems to have arisen upon the subject is traceable, we think, to a failure to observe in some cases the clear difference between the tests applicable to a motion for a directed verdict and the tests by which a jury must determine its verdict. The trial judge must act upon the motion, and he must also instruct the jury. The difference between his functions and the functions of the jury makes a difference between the tests which must guide him in acting upon the motion and the tests as to which he must instruct the jury.

The matter has an interesting historical background. Of course the roots lie in the long controversy over the respective functions of judges and juries in criminal cases. We need not recite that history here.[9] But a more specific historical chain of events appears in the reports. Originally the language quoted by this court in the *Hammond* case, *supra*, and above-quoted, was used in charges to the jury. The several reports of *United States* v. *Babcock* [10] seem to have been the source of some of the later confusion. In one report [11] is the court's consideration of a motion to direct a verdict. After discussing the relative functions of judge and jury, and relying upon *Hickman* v. *Jones* [12] and

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[8] *Pierce* v. *United States*, 252 U. S. 239, 64 L. Ed. 542, 40 S. Ct. 205 (1920); *Stilson* v. *United States*, 250 U. S. 583, 63 L. Ed. 1154, 40 S. Ct. 28 (1919); *Glasser* v. *United States*, 315 U. S. 60, 86 L. Ed. 680, 62 S. Ct. 457 (1942); *Gorin* v. *United States*, 312 U. S. 19, 85 L. Ed. 488, 61 S. Ct. 429 (1941); *United States* v. *Manton*, 107 F. 2d 834 (C. C. A. 2d, 1938); *United States* v. *Morley*, 99 F. 2d 683 (C. C. A. 7th, 1938); *Smith* v. *United States*, 61 App. D. C. 344, 62 F. 2d 1061 (1932). *See* the discussion in *United States* v. *United States Gypsum Co.*, 51 F. Supp. 613, 628-633 (D. C. D. C. 1943).

[9] *See* Bushell's Case, Vaughan 135, 6 How. St. Tr. 999 (1670); *United States* v. *Battiste*, 24 Fed. Cas. 1042, No. 14,545 (C. C. D. Mass. 1835); *State* v. *Fetterer*, 65 Conn. 287, 32 Atl. 394 (1894); 9 Wigmore, Evidence (3d ed. 1940) § 2495(e); Warvelle, The Jurors and the Judge (1909), 23 Harv. L. Rev. 123, 128, 130, 131; Howe, Juries as Judges of Criminal Law (1939), 52 Harv. L. Rev. 582, 586, 603.

[10] 24 Fed. Cas. 909, 912, 913 (C. C. E. D. Mo. 1876).

[11] No. 14,486, *id.* at 912.

[12] 9 Wall. 197, 19 L. Ed. 551 (1870).

Sioux City & Pacific R. R. v. *Stout*,[13] the court held that upon the motion, not only all facts in evidence must be considered as admitted, "but also every conclusion which a jury might fairly or reasonably infer therefrom"; and that where different men equally sensible and equally impartial would make different inferences, the case is for the jury. Another report in the same case[14] contains the court's charge to the jury. Here the court used as a correct exposition of the law applicable to the jury, a portion of the opinion in *People* v. *Bennett*[15] as follows:

> "The evidence must be such as to exclude every (reasonable) hypothesis but that of his guilt of the offense imputed to him; or, in other words, the facts proved must all be consistent with and point to his guilt not only, but they must be inconsistent with his innocence."

Years later, in *Hart* v. *United States*,[16] an appellate court considered whether the trial court erred in letting the case go to the jury, and, in affirming, said in part:

> "But, as we have said, the truth or falsity of the charge of unlawful combination, and of defendant's inculpating knowledge, could be determined only by inference from the facts shown; and the inference which the plaintiff in error insists should have been arbitrarily assumed was surely not a necessary one, and the jury has found it to be not even a reasonable one. We are clearly of opinion that it was not error to allow them to decide whether it was or not. The rule that, to justify conviction of crime, the evidence must be such as to exclude every reasonable hypothesis but that of guilt, has not, it will be observed, been overlooked. But by whom is this rule to be applied? In some cases, no doubt, by the court; but certainly not in such a one as this, where the reasonableness of the only hypothesis

[13] 17 Wall. 657, 21 L. Ed. 745 (1874).

[14] The charge to the jury is reported as Case No. 14,487, 24 Fed. Cas. 913.

[15] 49 N. Y. 135 (1872).

[16] 84 Fed. 799 (C. C. A. 3d, 1898).

> of innocence propounded presents at least a question upon which men of ordinary intelligence might honestly differ."

Then, still later, the Circuit Court of Appeals for the Eighth Circuit,[17] relying for authority upon *People* v. *Bennett*,[18] *United States* v. *Babcock*, No. 14,487,[19] *United States* v. *Hart*,[20] and *United States* v. *McKenzie*,[21] reversed a judgment for failure of the trial court to direct a verdict and recited the following as controlling upon the court in acting upon the motion:

> "Circumstantial evidence warrants a conviction in a criminal case, provided it is such as to exclude every reasonable hypothesis but that of guilt of the offense imputed to the defendant; or, in other words, the facts proved must all be consistent with and point to his guilt only and inconsistent with his innocence. The hypothesis of guilt should flow naturally from the facts proved and be consistent with them all. If the evidence can be reconciled either with the theory of innocence or of guilt the law requires that the defendant be given the benefit of the doubt and that the theory of innocence be adopted."

In all of the cases which that court cited, the stated rule had been used as an instruction to the jury and was approved as such.

In *Union Pacific Coal Co.* v. *United States*,[22] the same court again recited the rule as applying to a motion for a directed verdict, this time Judge Sanborn speaking in the language which has been so frequently quoted and relying upon *Vernon* v. *United States* [23] and the cases therein cited.

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[17] *Vernon* v. *United States*, 146 Fed. 121 (C. C. A. 8th, 1906).

[18] *Supra*, n. 15.

[19] *Supra* n. 14.

[20] *Supra* n. 16.

[21] 35 Fed. 826 (D. C. S. D. Cal. 1887).

[22] 173 Fed. 737 (C. C. A. 8th, 1909).

[23] *Supra* n. 17.

Thereafter the same court, in *Isbell* v. *United States*,[24] upon the same authorities, quoted the same rule, but this time the statement was under attack and the court explained its meaning at length. Judge Sanborn said:

> "The rule is that where *all*[25] the substantial evidence was as consistent with innocence as with guilt it is the duty of the appellate court to reverse the judgment against a defendant, not where there was a preponderance of the substantial evidence, or witnesses of the greater credibility in favor of his innocence, but where there was no substantial evidence, no substantial testimony nor credible witness whatever, of any facts inconsistent with the innocence of the accused. This is the only question the court is required or permitted to determine under this rule, and where there was any substantial evidence inconsistent with the innocence of the accused, although it may have been contradicted and overwhelmed by the testimony to the contrary, the weight of the evidence, the credibility of the witnesses and the guilt or innocence of the defendant are left to the determination of the jury."

Judge Carland dissented in that case, because he said that the unexplained statement of the rule is not the law, and concluded, "The explanation of what the language which I object to means as set forth in the majority opinion demonstrates, in my opinion, that it would be well to omit the language objected to."

In *Nosowitz* v. *United States*,[26] the Second Circuit used as the rule applicable to motions for directed verdict, without further explanation, the language which this court quoted in the *Hammond* case, *supra*, and cited *Union Pacific Coal Co.* v. *United States*[27] and *Isbell* v. *United States*,[28] as authority. The same court did the same thing in *Romano*

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[24] *Supra* n. 4.

[25] The emphasis was indicated in the opinion.

[26] 282 Fed. 575 (C. C. A. 2d, 1922).

[27] *Supra* n. 22.

[28] *Supra* n. 4.

v. *United States*,[29] citing *Nosowitz* v. *United States*[30] as authority. From that time on, that language has been repeatedly recited by various courts as the rule which must govern a trial judge in passing upon a motion for a directed verdict. As we have indicated, we are of opinion that the statement is erroneous for that purpose, or, at the least, misleading. It is correct as a guide for a jury in reaching a verdict. The minds in which a reasonable doubt, or its absence, must be established, are the minds of the jury.

It is only fair to say that the view which we take is perhaps at variance with the views which have been taken by some of the Circuit Courts of Appeal.[31]

Mindful of the rule of law as we have stated it, our first inquiry upon the facts in the case at bar is directed to the proof of a conspiracy to defraud. As we have pointed out, there was an organized Group and it had group activities. At the least, it rented offices, hired employees, paid telephone bills, made contracts, and did business. Appellants say that all the proven facts are consistent with the theory that the Group really expected that it would secure government contracts for its customers, to the profit of all concerned, but that its plans went awry; thus, that the plan was bona fide and merely failed of accomplishment. The contention ignores the misrepresentations, made from the very beginning, that the Group controlled the designation of contractors, that it actually had contracts to allocate, that its staff was large and experienced and its assets substantial. Those false representations as to existing facts may fairly be thought to disprove the claim of good faith in the plan. Moreover, the contention suffers from the failure of the Group to provide funds with which to carry

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[29] 9 F. 2d 522 (C. C. A. 2d, 1925).

[30] Supra n. 26.

[31] The Eighth Circuit, in *Gargotta* v. *United States*, 77 F. 2d 977 (1935), the Third Circuit, in *Nicola* v. *United States*, 72 F. 2d 780 (1934), *Grant* v. *United States*, 49 F. 2d 118 (1931), and *Graceffo* v. *United States*, 46 F. 2d 852 (1931), the Tenth Circuit, in *Parnell* v. *United States*, 64 F. 2d 324, 329 (*on rehearing*, 1933), and *Leslie* v. *United States*, 43 F. 2d 288 (1930) (*see* concurring opinion), and the Second Circuit, in *Nosowitz* v. *United States*, 282 Fed. 575 (1922), and *Romano* v. *United States*, 9 F. 2d 522 (1925), seem to have taken a view different from ours.

on until its expected business should materialize. If the original plan had been bona fide, it is hard to see why appellants did not supply or secure funds with which to meet obviously necessary operating expenses and thus to protect the deposits they intended to hold for return. Certainly the members of the Group who were conscious of what was being done in their names were, at the least, indifferent to the eventual result to the customers. The most charitable view which is possible is that customers were induced by false statements to supply the funds with which the Group gambled on success in its genuine hopes. Even that would be obtaining money by false representations. The jury was entitled to put a less favorable construction upon the circumstances.

Furthermore, even if the main plan were legitimate, plans and agreements which were secondary to the main plan might be fraudulent. Suppose a group intended to enter the grocery business and to make huge profits; nevertheless, if stock in the enterprise were sold upon false representations of fact and the receipts from such sales were wilfully squandered in promotion and operating expenses instead of being applied to the declared uses, the scheme would be fraudulent. That the scheme was secondary to a legitimate actual and declared objective would be immaterial. So here, even if the prime purpose were ultimate profit to everybody, an agreement to defraud in the preparatory steps of the project would be sufficient to violate the statute.

The Supreme Court has said:[32]

> "Participation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a 'development and a collocation of circumstances.' (Citing *United States* v. *Manton*, 107 F. 2d 834)."

It seems to us that in the case at bar the jury might reasonably conclude that, beyond a reasonable doubt, the members of this organized Group consciously planned to

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[32] *Glasser* v. *United States*, 315 U. S. 60, 80, 86 L. Ed. 680, 62 S. Ct. 457 (1942).

secure funds from outside parties by gross misrepresentations, and to spend that money, anticipating that if the main venture were successful abundant profits to all would result, but that if failed the loss would be upon the customers and not upon the Group. If the Group knew that the venture was wholly a speculative risk, but persuaded the customers by false statements that reasonable certainty of success and full certainty of no loss were insured, the scheme was a scheme to obtain money by means of false representations and promises.

The next inquiry upon the facts in the case at bar concerns the participation of Curley. The crucial question at this point seems to us to be whether he knew of the wrongful acts being committed in the name of the Group. Because, if he knew, reasonable minds might fairly conclude that he must necessarily have been a participant in the scheme, *i.e.*, a conspirator; that no other hypothesis is consistent with that knowledge and his acts. Was such knowledge on his part a legitimate inference from the proven facts? It seems to us that it was. He was president of the corporation. He was frequently in its offices. He introduced customers. He personally attempted to arrange with a bank for a "loan" which was to be left on deposit, a sham depiction of financial substance. The misrepresentations made by the Group were total, not incidental or occasional. They were made not to occasional customers or clients but to all of them. The misrepresentations were not as to whether a group, in control of certain contracts, was also in control of others; this Group had control of no contracts whatever. The misrepresentations were not as to incidents of the staff and organization of the Group; it had no staff worthy of the name. The Group did not have funds which it might legitimately use for operating expenses and, by inadvertence or misconduct of an individual, dip into other funds which it was obligated to hold on deposit; it had no funds whatever, other than the deposits. Occasional, incidental or partial misrepresentation or misappropriation by one officer of a corporation may be unimpressive as a basis for imputing knowledge to another officer; but total misrepresentation of the corporate affairs and total diversion of

funds is substantial ground for an inference of knowledge on the part of an active and experienced president. The jury might fairly and legitimately infer as a fact from the proven facts that Curley knew of the wrongs being committed. As we have said, if he knew, his proven activities with and on behalf of the Group might fairly lead, if not compel, reasonable men to conclude that he must necessarily have been a participant in the plans of the Group. It cannot be said that upon all this evidence reasonable minds must necessarily doubt that Curley was a participant in the activities of the Group.

All of the evidence to which we have referred was *aliunde* the declarations of alleged co-conspirators, and thus the preceding discussion is clear of any dispute as to the admissibility of such declarations. If our conclusions on the foregoing matter are correct, those declarations were admissible, and they tend to strengthen the contentions of the Government.

The decision in the case rests squarely upon the rule of law governing the action of the trial judge upon the motion for directed verdict of acquittal and the action of an appellate court upon a verdict of conviction. We agree, as Curley contends, that upon the evidence reasonable minds might have had a reasonable doubt. As much might be said in many, if not in most, criminal cases. The jury, within the realm of reason, might have concluded that it was possible that Curley was merely a figurehead, that he had complete faith in Fuller, that he never asked any questions, that he was never informed as to the contents of the contracts with customers or the financial statements or the use of the money; in short, that it was possible that he was as much put upon as were the customers. If the jury had concluded that such was a reasonable possibility, it might have had a reasonable doubt as to guilt. But, as we have stated, that possibility is not the criterion which determines the action of the trial judge upon the motion for directed verdict and is not the basis upon which this court must test the validity of the verdict and the judgment. If the evidence reasonably permits a verdict of acquittal or a verdict of guilt, the decision is for the jury to make. In such case, an appellate court cannot disturb

the judgment of the jury. If we ourselves doubted Curley's guilt, that doubt would be legally immaterial, in view of the evidence and the rule of law applicable. However, we think it proper to add, under the circumstances of the case, that to us, as to the jury, there is no doubt.

We find no substantial error in the other respects in which the appellant Curley asserts that the trial court erred. That the substantive counts may relate to the overt acts charged in the conspiracy count, and that each participant in a conspiracy is liable upon substantive counts for all acts committeed by another conspirator pursuant to the conspiracy, are settled by *Pinkerton* v. *United States*, U. S. Sup. Ct., June 10, 1946, 14 U. S. L. Week 4456. That Curley's testimony taken in the Municipal Court of the City of Boston, on behalf of a judgment creditor, was admissible in the present case, was settled by *Feldman* v. *United States*, 322 U. S. 487, 88 L. Ed. 1408, 64 S. Ct. 1082 (1944).

Appellant Fuller makes the same contention as does Curley in respect to the motion for a directed verdict, but his contention has not the same foundation in the facts. Fuller was the active agent throughout. It is plain that the trial judge correctly denied Fuller's motion. We find no other error of substance in respect to this appellant.

Appellant Smith shows that he came into the organization late and left soon thereafter, being treasurer of it for only two months. He shows that he had difficulty in getting possession of the books and did not actually get them for a month. But the record indicates his activity in connection with the organization before he was treasurer, and he was an actual participant in the negotiation of several of the contracts with customers. He was shown to have knowledge of the state of the finances. We think the evidence sufficient to send the case to the jury and to sustain the verdict.

Appellant Smith urges as error the refusal of the court to admit in evidence 20 exhibits offered by him. His counsel refers to 14 of these as showing his good faith and the absence of any knowledge on his part of any fraud

or misrepresentation.[33] From time to time during the presentation of the Government's evidence, counsel for Smith, in cross examination, presented the witnesses with documents which they identified. At one point Government counsel objected to this procedure on the ground that Smith was thereby making the witness his own witness, and that he could not introduce his own evidence in the course of cross examination. The court said, however, that in the interest of expedition he would permit a witness to identify a document while he was on the witness stand, although he would not let counsel for Smith pursue the matter beyond that point during the course of cross examination. In this manner the 20 exhibits were identified. When the evidence was apparently all in, both sides announced that they rested. This happened to be on a Friday, and the court thereupon excused the jury until Tuesday. Monday was devoted to a discussion of requests for instructions, and at the conclusion of that discussion, counsel for Smith said that he believed he had forgotten to offer formally in evidence the documents which had been identified. Government counsel protested on the ground that to admit the documents would be to reopen the case, requiring cross examination, rebuttal, etc. Counsel for Smith points out that the Government had had the documents for some two years, that they had been identified by Government witnesses, and that his failure to move their admission was an inadvertence purely technical in nature. The court ruled that it would not permit the reopening of the case at that stage.

In view of all the circumstances, including the nature of the exhibits, the absence of surprise to Government counsel, the manner of their identification, and the fact that the case had not been argued to the jury, we think that if the exclusion of these exhibits had affected the substantial rights of Smith, the action of the court might

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[33] Our discussion does not relate to 4 of the 14. Smith Exhibit No. 2 became Government 163 and was admitted. Smith No. 7 became Government 98 and was admitted. Smith No. 9, although marked for identification, was not actually identified. Smith No. 20 was an affidavit of Smith himself and was clearly inadmissible as a self-serving declaration.

have constituted reversible error. Whether his substantial rights were affected depends upon the nature of the documents.

We have carefully examined all of these exhibits. Some of them consist of correspondence between customers and Fuller, relating to the business of the corporation, and do not refer to Smith in any way; one is merely an inquiry from one company to another concerning Smith and Engineers' Group; two concern Smith's business activities after he left Engineers' Group, running from April, 1942, to August, 1943; one is a statement of the deposits made and checks issued by Smith while he was treasurer; and the last is a statement by Fuller showing that he authorized Smith to issue the checks which were issued. We do not see how these exhibits relate to Smith's good faith; they throw no light on it one way or the other. The nearest approach to the subject is one statement in a letter from a customer to Smith, in which the customer indicated that he then thought that Fuller was a rascal but that Smith did not deserve to be involved; but the author of that letter was on the witness stand during the trial and counsel had full opportunity to draw from him the full measure of his exoneration of Smith. It does not seem to us that the exclusion of this evidence, therefore, affected the substantial rights of Smith.[34]

Affirmed.

WILBUR K. MILLER, J., dissenting in No. 9208:

It is my view that the jury should have been instructed to find the appellant, James M. Curley, not guilty. The wrongs were done by Fuller. Curley made no representations to anybody. He did not participate in negotiations with customers. He signed no letters, executed no contracts. He did not know of the brochure or the financial statement. He received no money or other thing of value. All this is admitted, even recited, in the court's opinion.

Whether Curley was guilty depended, therefore, on whether he knew of the wrongful acts being committed in

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[34] Judicial Code, § 269 as amended, 28 U. S. C. A. § 391.

the name of the Group. That, the court correctly says, is the crucial question with respect to him. There was no criminal intent if he did not know. If he knew, then it would follow that he had become a conspirator with Fuller. But the evidence of knowledge must be clear, not equivocal.[35]

It is true, of course, that whether Curley had knowledge of Fuller's wrongdoing could not be proved directly, but could only be inferred from what Curley did. Nevertheless, the presumption of innocence insists that there be no equivocation in that proof. As always, it must convince beyond a reasonable doubt. If it be not of that quality, if it be not clear but equivocal, then the jury must not be permitted to speculate that the defendant is guilty.

Let us see then what Curley did. We need go no further than the court's opinion, where the proof of his acts is thus summarized:

> "He was president of the Group. He was frequently in its offices. He introduced customers. He personally

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[35] Chief Justice Stone said in *U. S.* v. *Falcone*, 311 U. S. 205, 210:

> "The gist of the offense of conspiracy as defined by § 37 of the Criminal Code, 18 U. S. C. § 88, is agreement among the conspirators to commit an offense attended by an act of one or more of the conspirators to effect the object of the conspiracy. (Cases cited.) Those having no knowledge of the conspiracy are not conspirators; and one who without more furnishes supplies to an illicit distiller is not guilty of conspiracy even though his sale may have furthered the object of a conspiracy to which the distiller was a party but of which the supplier had no knowledge."

Mr. Justice Rutledge, writing in *Direct Sales Co.* v. *U. S.*, 319 U. S. 703, said that the Falcone decision "comes down merely to this, that one does not become a party to a conspiracy by aiding and abetting it, through sales of supplies or otherwise, unless he knows of the conspiracy; . . ." He then adds, "Without the knowledge, the intent cannot exist. *United States* v. *Falcone, supra.** Furthermore, to establish the intent, the evidence of knowledge must be clear, not equivocal."

* At this point, Mr. Justice Rutledge appended the following foot-note, which seems to me to be of particular significance in the present case:

> "Although this principle was there applied to aiding and abetting a conspiracy among others, it has at least equal force in a situation where the charge is conspiring with another to further his unlawful conduct, without reference to any conspiracy between him and third persons."

attempted to arrange with a bank for a loan which was to be left on deposit. . . ."

That is all the record shows against Curley, except that he once attempted, at the request of a customer of the Group, to get Fuller to return that customer's deposit.

What of the quality of such proof? Is it unequivocal so as to fairly permit a jury to infer, beyond a reasonable doubt, that Curley knew of Fuller's wrongful acts? In that respect, again we need go no further than the court's opinion, where we read, "The jury, within the realm of reason, might have concluded that it was possible . . . that he was as much put upon as were the customers."

That statement, with which I quite agree, means that Curley's conduct was reasonably consistent with his innocence. So, at the conclusion of the government's evidence, when the case was submitted to the jury, that body could believe every word said against Curley and still it must choose between inferring guilt or innocence, when the evidence afforded no reason for choosing the former instead of the latter. In such circumstances, it is impossible for the jury to infer guilt; it can only surmise it. Webster says that the word "infer" frequently implies little more than "surmise," but I have never supposed that such a connotation is proper concerning the action of a jury in a criminal case.

It should be remembered that in this case there was no room for weighing evidence, determining the credibility of witnesses, or drawing *justifiable* inferences from proved facts—all traditional functions of the jury. For, on the motion for a directed verdict, the government's evidence could be given the fullest weight, its witnesses could be regarded as credible, and yet the inference of guilt was not justifiable and the jury should not have been permitted to draw it. The reason is that the inference of guilt from circumstantial evidence is never justifiable when the proved facts at least equally well permit innocence to be inferred. Guilt can be inferred from such evidence only when it is so strongly compelled that the inference of innocence is excluded.

With the meagre evidence against Curley quite consistent with his innocence, as the court says, it seems to me that the case falls squarely within the rule announced by this court in *Hammond* v. *United States:* [36]

> "Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial judge to instruct the jury to return a verdict for the accused, and where all the substantial evidence is as consistent with innocence as with guilt it is the duty of the appellate court to reverse a judgment against him."

This is not a new rule in this jurisdiction, for as far back as 1923, in *Cady* v. *United States,*[37] this court spoke approvingly of it as a "well-established and oft-repeated principle." I think it is a sound rule, because it is based upon the presumption of innocence. But the court's opinion in this case definitely overturns it and, in effect, announces that it is no longer necessary for the government's proof to foreclose the hypothesis of innocence.

To prove guilt beyond a reasonable doubt does not mean merely to prove certain facts which are as consistent with innocence as guilt. To me the expression means to submit evidence which produces in the minds of the jurors an abiding and conscientious conviction, to a moral certainty, that the accused is guilty. I am aware of the fact that his classic paraphrase of proof beyond a reasonable doubt by Chief Justice Shaw of Massachusetts [38] has been criticized of late, but I do not agree with the critics. Reasonable doubt is not eliminated by evidence from which the jury may draw either of two irreconcilable inferences.

There is in civil cases a rule which is apropos here, for if it be the rule in civil cases it is much more necessary that it be the rule also in similar situations in criminal cases.

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[36] 75 U. S. App. D. C. 397, 127 F. (2d) 752.

[37] 54 App. D. C. 10, 11, 293 Fed. 829, 830.

[38] *Commonwealth* v. *Webster,* 5 Cush. 295, 320.

In *Pennsylvania Railroad Co.* v. *Chamberlain*, 288 U. S. 333, 339, the Supreme Court said:

> "We, therefore, have a case belonging to that class of cases where proven facts give equal support to each of two inconsistent inferences; in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other, before he is entitled to recover."

Again, at page 340, the Supreme Court quoted the following sentence with approval:

> "There being several inferences deducible from the facts which appear, and equally consistent with all those facts, the plaintiff has not maintained the proposition upon which alone he would be entitled to recover."

The jury inferred guilt, when the court said it "might have concluded that it was possible" that Curley was innocent. We, therefore, have a case where proved facts give equal support to each of two inconsistent inferences. Judgment, *as a matter of law*, must go against the government which had thrown upon it by the presumption of innocence the necessity of justifying the inference of guilt.

Under the view of the evidence which the court has taken and in which in the main I concur, the *Hammond* case unquestionably required a reversal as to Curley. So my brothers of the majority say that the rule stated in the *Hammond* case is misleading and has become confused in application.

The confusion which they discern they attribute "to a failure to observe in some cases the clear difference between the tests applicable to a motion for a directed verdict and the tests by which a jury must determine its verdict." Originally, they say, the language quoted in the *Hammond* case was used in charges to the jury, and only later came in vogue as a guide for the court in considering a motion for a directed verdict. The opinion then adds that "the statement is erroneous for that purpose, or, at the least,

misleading. It is correct as a guide for the jury in reaching a verdict."

The implication is, I suppose, that gradually and through a sort of evolution, as it were, and perhaps inadvertently, numerous courts, including this one in the *Hammond* case, have fallen into error. It will be observed, however, that the *Hammond* opinion quotes its rule from *Isbell* v. *United States,* 227 Fed. 788, decided by the Eighth Circuit in 1915. Because of the learning, ability and industry of the members of this court who decided the *Hammond* case (Chief Justice Groner and Justices Edgerton and Rutledge, the latter now an associate justice of the Supreme Court of the United States) it may properly be inferred, or surmised, that the *Isbell* case was examined and considered carefully before its statement of the rule was adopted. We may safely assume also that the court exhausted the authorities on the subject, and certainly it read and considered the dissenting opinion in the *Isbell* case. That dissent had the same quarrel with the statement quoted by us in the *Hammond* case which the majority raise in deciding this case. The basis of the dissent is identical with the basis of the court's opinion here.

It follows, therefore, that there was nothing inadvertent about the adoption of the *Hammond* rule. It was deliberately done by an able and unanimous court, after having attention sharply called to the theory which the opinion in this case says is the "true rule."

The case of *Estep* v. *United States,*[39] decided in 1943 by the Court of Appeals for the Tenth Circuit, is instructive in connection with the consideration of the present case.

Estep, Deluke and Henry were convicted of having devised a fraudulent scheme for the sale of mining stock and of having used the mail in connection with the sale of the stock in violation of the mail fraud statute, and of a conspiracy to devise the fraudulent scheme. It was amply proved that Henry and Deluke were guilty, although they maintained that they had an honest belief in the representations and promises which they had made. Upon the trial they reasserted their faith in the potentialities of the min-

[39] 140 F. (2d) 40.

ing property. It was undisputed that the money obtained by the sale of the stock, with the exception of certain commissions, was used in the development and operation of the mines.

Estep contended that if there was a fraudulent scheme or conspiracy, he was never a party to it and never a conscious participator therein. The Circuit Court of Appeals held that the evidence was entirely sufficient to justify the conclusion of the jury that Henry and Deluke conspired to devise the scheme to defraud, and that one or more overt acts were committed in the furtherance of the conspiracy. But the court also held that there was no evidence reasonably tending to show that Estep originally devised a scheme to defraud, or joined a conspiracy. It was contended by the government that he knowingly aided and assisted in the execution of the fraudulent scheme, and that he joined and adopted the conspiracy, and thereafter consciously participated therein by affirmative acts from which the jury was justified in holding him criminally responsible.

It is true, the court said, that guilty knowledge or criminal intent is usually a factual question for the jury, and is seldom provable by direct evidence, but must be inferred from facts and circumstances which reasonably tend to manifest a mental attitude. Quoting from *Direct Sales Co., Inc.*, v. *United States*, 319 U. S. 703, the court said:

> "Without the knowledge, the intent cannot exist. . . . Furthermore, to establish the intent, the evidence of knowledge must be clear, not equivocal."

The court then added:

> "Often the line between honest belief and purposeful misrepresentation is fine and indistinct; between the two however lies guilt or innocence, and where the evidence is evenly balanced between guilt and innocence, a conviction cannot stand."

The evidence against Curley was much weaker than that against Estep, but the proof in the two cases was, in some respects, strikingly similar. For example, Estep introduced Deluke to the members of his church and urged them

to buy the stock of the various corporations. His intense interest in the venture greatly influenced the members of his church to purchase the stock. The court said that there could be no doubt that Estep was instrumental in the effectuation of a scheme which the jury found to be criminally fraudulent. But there was no direct proof tending to show that Estep profited, or hoped to profit, from the sale of the stock except that it might benefit the church of which he was the founder and leader. He was subjected to the same sales psychology as the other members of his church, and his resistance was no greater.

Having recited more in detail what we have summarized, the court significantly said:

> "From the evidence, it is as reasonable to conclude that Estep was victimized by Henry and Deluke, as that he was a conscious participator in the fraudulent scheme or the conspiracy. We conclude that the verdict of the jury as to Estep is not supported by that degree of proof which we deem essential to a finding of guilty knowledge and criminal intent, and accordingly the judgment is reversed as to him."

In like manner, in this case it is as reasonable to conclude that Curley was victimized by Fuller, as that he was a conscious participator in the fraudulent scheme. It is my opinion, therefore, that the verdict of the jury as to Curley is not supported by that degree of proof which I deem essential to a finding of guilty knowledge and criminal intent, and accordingly I think the judgment as to him ought to be reversed.

My view of the evidence against Curley and of the sound and salutary principle of law which I think requires that he should go acquit is well stated in the dissenting opinion in *Warner* v. *United States:*[40]

"Coming now to the evidence tending to prove defendant's guilt under count 1 of the indictment, and what do we find? There is absolutely no direct or positive evidence. The sole eliance of the government is, and must rest upon, mere circumstantial evidence.

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[40] 60 F. (2d) 700 (C. C. A. 10, 1932).

. . . And how does he (the writer of the prevailing opinion) attempt to justify the fact that the circumstantial evidence found in the record is sufficient to support the conviction? On the thought that, to his mind, the circumstances in evidence, when compared, tend more strongly to sustain the guilt than the innocence of defendant. As this position must depend more upon the cast of mind than upon the circumstances themselves, I had not thought such a view of a case could be taken. I had thought the rule to be, before circumstantial evidence proved anything, this evidence must arise to such dignity of proof as to exclude any and every other reasonable hypothesis than the guilt of the accused. I had thought this theory of circumstantial evidence was simple hornbook law, not needing any authority in its support. If it does, the books are full of cases laying down this rule, that circumstantial evidence which fails to arise to this high degree of proof is no evidence at all (*and*)[41] proves nothing.

"Such, to my mind, is the law and the rule to be at all times applied or the presumption of innocence with which a defendant stands before the bar of justice clothed by the law is not overcome. Who can say, who does say, in this case, the evidence in this case arises to such dignity as to exclude every other reasonable theory than the guilt of defendant?"

Even the majority opinion in the *Warner* case says that "substantial evidence was requisite that was more consistent with his guilt than with his innocence."[42] This is not in acoord with the court's opinion in this case which squarely holds that the function of determining reasonable doubt *vel non* "is the jury's function, provided the evidence is such as to permit a reasonable mind fairly to reach either of the two conclusions." Such a statement is so far from being either safe or sound that I am unable to agree with the majority and must, with all deference, dissent.

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[41] Patent omission supplied.

[42] In *Williams* v. *United States*, 78 U. S. App. D. C. 322, 140 F. (2d) 351, this court said:

> "To sustain it (the conviction) we should have to find, at least, that the evidence is more consistent with guilt than with innocence. Warner *v.* United States, 10 Cir., 60 F. (2d) 700."

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 9208, January Term, 1947

James M. Curley, *Appellant*,

vs.

United States of America, *Appellee*

No. 9209, January Term, 1947

Donald Wakefield Smith, *Appellant*,

vs.

United States of America, *Appellee*

No. 9215, January Term, 1947

James G. Fuller, *Appellant*,

vs.

United States of America, *Appellee*

Appeals from the District Court of the United States for the District of Columbia

Before Edgerton, Wilbur K. Miller and Prettyman, JJ.

Judgment

These appeals came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia, and were argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgments of the said District Court appealed from in these cases be, and the same are hereby, affirmed.

Per Mr. Justice Prettyman.

Dated January 13, 1947.

Dissenting opinion by Mr. Justice Wilbur K. Miller in No. 9208.

[Stamp:] United States Court of Appeals for the District of Columbia, Filed February 5, 1947. Joseph W. Stewart, Clerk.

UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA

No. 9209

DONALD WAKEFIELD SMITH, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

PETITION FOR REHEARING

The appellant, Donald Wakefield Smith, by his attorney, Wm. A. Gallagher, petitions this honorable Court for a rehearing in this cause, and for reason therefor says:

That the appellant has suffered from that "loss of identity in the mass" commented on by the Supreme Court of the United States in the *Kotteakas* case, (*Kotteakas et al.*, v. *U. S.*, decided June 10, 1946) and has had attributed to him, by speculation in the lower Court, and by assumption in this Court, characteristics of knowledge, participation, and guilty conduct, not justified by the evidence against him, and, indeed, directly contradicted and dissipated by the testimony of government witnesses and by documentary evidence offered against him, and documents offered in his behalf, but rejected by the lower court. The record justifies the statement that this appellant has been the victim of an "unwarranted imputation of guilt from others' conduct." (Again quoting from the *Kotteakas* case, *supra.*)

It is truly pointed out in the opinion of this Court, that Smith "came into the Engineers Group late and left soon thereafter;" and that "he had difficulty in getting possession of the books and did not actually get them for a month," after he assumed office as treasurer on December 17, 1941.

This court has further said in its opinion that "the record indicates his" (Smith's) "activity with the organization before he was treasurer, and he was an actual participant in the negotiations of several of the contracts with custom-

ers; and he was shown to have knowledge of the state of the finances."

There is no evidence in the record that prior to December, 1941, this appellant was active in any way in connection with any matter charged in the indictment; to a certainty the record does not disclose any participation by him in any conspiracy or scheme to defraud, or any knowledge of the existence of such a scheme or conspiracy, prior to his taking office on December 17, 1941. Both by directed verdict and by the acquittal at the hands of the jury, this statement is justified. By the testimony of the government witnesses concerning contracts prior to his assumption of office in December, 1941, he was completely exculpated.

With respect to Smith's conduct in office there is neither testimony nor documentary evidence to justify the assumption that he was not acting in good faith, or that his handling of the funds was contrary to the purposes intended by the contracting parties who made payments to the Engineers Group, Inc. Further than this, Smith's name was forged in an endorsement of a check to the Engineers Group, dated January 16, 1942, in the amount of $7,500.00 (Gov't Ex. 159) and he knew nothing of the check nor the forgery until after his resignation in February, 1942. This alone was striking evidence of the deceit practiced upon him by the defendant, Fuller. The affidavit given by Smith to Anderson of the Advertising Metals Display Company, in April of 1942, to assist that Company in its recovery of the amount of the check, and the circumstances surrounding it, was marked "Smith's Ex. 20" and was one of the exhibits in the group which the lower court refused to admit. It is here submitted that this document was of such a nature that its exclusion affected the substantial rights of the appellant because it was a concrete demonstration of his good faith which it is believed would have had tremendous effect upon the jury if they had been allowed to read it, and if counsel had been allowed to comment upon it in argument. At any rate, the defendant was entitled to its benefit, under the ruling of this court in its opinion herein. And counsel for Smith was denied "full opportunity" to cross-examine the witness Anderson with respect to the document itself

and with respect to other matters looking to his exoneration, despite the most earnest efforts, as the record discloses.[43]

The record discloses also, in the testimony of the witness J. L. Davis, the auditor who testified for the prosecution, (R. 1402) that it was not until the 13th of February, 1942, that he was able to give to Smith the statement showing the condition of the finances of the Engineers Group. This statement, (Smith Ex. for Identification No. 15) was, according to the witness, Davis (the only audit he had been able to make of the books of the Company. Thus it was not until February 13, 1942, that Smith is "shown to have knowledge of the state of the finances." The solid and concrete documentary evidence of this was Davis' written statement marked for identification Smith No. 15. This also was one of the documents excluded by the lower court, as having been offered too late. This was a piece of evidence which spoke for itself, and coupled with the significant facts, first, that the statement was given to Smith on Friday or Saturday, February 13 or 14, 1942, and, second, that Smith resigned on the following Monday, February 16, 1942, it is submitted that being a document prepared at the time of its date and submission to Smith, it threw a strong light upon the reason for his resignation as being caused by his first apprisement of the financial condition of the Engineers Group, Inc. There is no word of evidence that Smith had any knowledge of the manner in which his predecessor, Everett Hurt, who had handled all but a very small proportion of the funds of the enterprise, had accounted for assets received, the purpose for which they had been received or the use made of such assets. Hurt was never indicted as one of the so-called conspirators although he was the first and only other treasurer, prior to Smith. And although Hurt was subpoenaed as a witness for the prosecution, he was never produced to testify. The prosecution, in argument and in its brief, has foisted upon Smith responsi-

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[43] This affidavit was not a self-serving declaration, because the fact that Smith's name was forged upon the endorsement of the check in question was admitted by government counsel, and the only grounds urged by them against its admissibility was that the offer of the Exhibit came too late.

bility for, and knowledge of, the conduct of Hurt, when cancelled checks, signed by him as treasurer of Engineers Group, Inc., show disbursements of the funds of the enterprise to Mercedes Hurt, his wife, of thousands of dollars; as well as checks to Robert Thach and to Rayford Alley, both of whom were identified as intimately connected with the affairs of the enterprise long prior to Smith's knowledge of its existence; Thach as a director, stockholder and secretary therein, as well as general counsel. Both Thach and Alley were subpoenaed as witnesses by the prosecution, but neither was produced to testify, nor was either indicted.

In connection with the statement in the opinion of this court on page 3, line 5, an examination of the checks showing that Fuller "withdrew about $18,000 'in checks to himself or otherwise' " and an examination of the audit made by Joseph Genau, auditor for the Department of Justice, proves beyond any possibility of doubt or question, that Fuller was paid more than $15,000 of the $18,000 referred to, *by Hurt,* and *not by Smith;* and yet by argument of government counsel, by the opinion of this court, quoted above, and by failure of the lower court properly to charge the jury, the appellant Smith has been blanketed with responsibility for these disbursements, and his rights thereby substantially affected. There is no evidence, much less clear and unequivocal proof, that Smith either directly or indirectly, made any disbursements or use of monies which were improper or illegal.

With respect to the statement that "he was an actual participant in the negotiation of several of the contracts with customers," at page 11 of the opinion of this court, the closest scrutiny of the record does not disclose any customers of the enterprise with whom Smith could possibly be said to have participated in negotiations except the Advertising Metal Display Company, the Norcor Corporation and the Forse Corporation. The extent of his "participation" as shown by the record, is as follows:

1. Smith was not present at any time during the negotiation of any contract with the Advertising Metal Display Company. Major Anderson of that Company, who was present during all of the negotiations, testified that Smith

was not present. His testimony is given on page 28 of this appellant's reply brief herein and fully covers the subject.

2. The testimony of Arthur E. Schumacher, President of the Norcor Manufacturing Company, beginning at page 840 of the record, and earlier at page 837, definitely and without reservation, clears Smith of any participation in any of the discussions concerning the Norcor contract and transaction. This is corroborated by the testimony of Harold E. Fuller at page 1011 of the record.

3. The testimony of Harry Donald Forse, president of the Forse Corporation, (R. 1318) and John L. Hamilton, a representative of the Forse Corporation, (R. 1373, 1374, 1375, 1378) established that they were present at, and handled, all negotiations relating to their contract with the Engineers Group, Inc. They were unanimous in stating that Smith did not participate in the negotiation of such contract. Smith never recommended the Engineers Group, discussed any contracts, nor made any representations to anyone concerning Engineers Group, who was connected with it, or what they could do. (R. 1374, et seq.)

The record is devoid of any evidence which would justify the assumption that Smith made or participated in, or indeed knew about, any misrepresentations made to contracting parties.

Insofar as the defendant Smith is concerned it is not true that "the Group did not have funds which it might legitimately use for operating expenses. . . ." (Page 10 of the opinion herein). Forse, of the Forse Corporation, Schumacher, president of the Norcor Company, and Anderson, Schumacher, president of the Norcor Company, and Anderson, of the Advertising Metal Display Company, testified as follows:

Forse (R. 1290): "The money, of course, was given to their Company and could be used as they saw fit, . . ." His Company did not expect that the money would be left in the bank. It could be used by the Engineers Group for operating expenses. (R. 1291-1357). It was his opinion that the Engineers Group had tried hard to get him satisfactory contracts. (R. 1303.) And in response to the

question whether he thought he had received his money's worth, his answer was that he had never made any complaint; that he knew that they were using the money every day in their work and was satisfied that the Engineers Group was making an honest and sincere effort to produce contracts and were doing the best they could (R. 1296-1307).

ANDERSON (R. 2665, 2677): This witness testified that the money put up by the Advertising Metal Display Company was by way of an advance fee and was to cover the expenses of the Engineers Group. "We paid the money over to them and how they used it would really be up to them to determine, not for us." (R. 2678.) See his further testimony on this subject on pages 14, 15 and 16 of Appellant's Reply Brief.

SCHUMACHER (R. 893, 894, 895): He testified that his Company, Norcor Manufacturing Company, had agreed to pay the Engineers Group for whatever services they had rendered. This is confirmed by the letter of Maurer, General Manager of Norcor Company, to Engineers Group, on February 24, 1942, after Smith's resignation, requesting Engineers Group to submit an account rendered up to date, "your check for difference of your account and the *retainer* advanced to you." Thus the Norcor Company fully understood that the money it put up was in the nature of a retainer and was to be used to cover expenses. The letter above referred to was marked "Smith for Identification Ex. 5" and was one of the group of letters barred from evidence. It seems needless to comment on the importance of this letter as a piece of evidence, and the error in refusing it admission.

The other documents barred from admission as Smith's exhibits demonstrated, among other things, that engineers were employed and made surveys. See documents marked "Smith for Identification No. 6, 7, and 8. The group of letters and telegrams marked from 9 through 10-W cover many phases of contracts and engineering services obtained for, and submitted to, the Forse Corporation. The other documents confirm Smith's position that insofar as the

records of the Engineers Group disclose, and so far as he knew contracts were being negotiated and submitted, that engineering services were being rendered, and legitimate expenses were being incurred. The testimony of the engineer, Hawkins, a government witness, fully confirms this, but the documents themselves go to indicate the information that was available to Smith at that time. In this light they would have been weighty evidence had their use been allowed.

The letters marked "Smith Exhibits for Identification 19-A and 19-B" which constituted an exoneration of Smith by Anderson of the Advertising Metal Display Company, as indicated by the Court in its opinion, were identified by the witness Anderson, but the Court would not permit the witness to go beyond that, nor "let counsel for Smith pursue the matter beyond that point during the course of cross examination," as this Court remarks in its opinion, at page 11. So that counsel did not have "full opportunity to draw from him the full measure of his exoneration of Smith", as the Court later says on page 12 of its opinion. It was, therefore, error to refuse this exhibit admission in evidence. The certificate of Fuller covering checks issued by Smith, marked "Smith Exhibit 19 for Identification" was important in the light of the argument of government counsel that the checks issued by Hart had been properly issued because the check stubs themselves had been initialed by Fuller, and that this showed a proper authorization for the expenditures. The certificate established that the checks issued by Smith had not only been authorized but had been directed to be issued by Fuller, and thus were issued by Smith in good faith. On the point of good faith, it must be conceded from the testimony of Davis, the auditor, (R. 1504) that the appellant Smith *did* contribute more than $1,000 to the treasury of the Engineers Group, and that this money is still due and owing to him; which does not include sums approximating $1,000 advanced by him for operating expenses which was repaid.

In view of the foregoing matters, which are believed to be important especially in the light of the Court's opinion

herein, there are other equally important phases of the law and evidence not discussed in the opinion nor in this petition bearing upon appellant's knowledge, intent and good faith, by which he is materially set apart from anyone else connected with Engineers Group.

Rehearing is asked for the further reason that such rehearing will afford counsel an opportunity to discuss in argument and briefs the application of Hammond *v.* U. S., and Isbell *v.* U. S., as construed by the Court in its opinion herein, to the facts in this case: this in view of the conflict between the construction adopted by this Court and the construction adopted by other Circuit Courts of Appeal, which conflict was not contemplated nor foreseen by counsel in the Court below nor in the brief and argument on behalf of the appellant Smith. This opportunity is asked, unless the Court is of opinion that the decision rendered in this case forecloses such opportunity.

Respectfully submitted,

WM. A. GALLAGHER,
203 Union Trust Bldg.,
Washington, D. C.,
Attorney for Appellant.

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing petition upon Honorable William A. Paisley, Assistant United States Attorney General, Department of Justice, Washington, D. C., by mailing the same to him, postpaid, at his office in the Department of Justice, Washington, D. C.

WM. A. GALLAGHER.

[Stamp:] United States Court of Appeals for the District of Columbia. Filed Feb. 20, 1947. Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, JANUARY TERM, 1947

No. 9209

DONALD WAKEFIELD SMITH, *Appellant,*

v.

UNITED STATES OF AMERICA, *Appellee*

Before: Edgerton, Wilbur K. Miller and Prettyman, JJ.

ORDER

On consideration of appellant's petition for rehearing herein, It is

Ordered by the Court that the petition for rehearing be, and it is hereby, denied.

Per CURIAM.

Dated February 20, 1947.

[Stamp:] United States Court of Appeals for the District of Columbia. Filed Apr. 11, 1947. Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 9209

DONALD WAKEFIELD SMITH, *Appellant,*

vs.

UNITED STATES OF AMERICA, *Appellee*

DESIGNATION OF RECORD

The Clerk of the Court will please prepare a certified transcript of record for use on petition to the Supreme Court of the United States for Writ of Certiorari in the above-entitled cause, and include therein the following:

1. Transcript of record and exhibits.

Note to Clerk: The transcript and exhibits have already been transmitted to the Supreme Court for use in connection with the companion case of Curley *v.* U. S., docketed in the Supreme Court as No. 1211, October Term, 1946; and therefore the Clerk need not include same herein.

2. Opinion.
3. Judgment.
4. Petition for rehearing.
5. Order denying rehearing.
6. This designation.
7. Clerk's certificate.

WM. A. GALLAGHER,
Attorney for Appellant.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing designation of record was served by mailing a copy thereof to Hon. Wm. A. Paisley, Department of Justice, Washington, D. C., attorney for Appellee, this 11th day of April, 1947, postpaid.

WM. A. GALLAGHER.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

I, Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia, hereby certify that the foregoing pages numbered from 1 to 31, both inclusive, constitute a true copy of the proceedings of the said Court of Appeals as designated by counsel for appellant, except Item No. 1, in the case of: Donald Wakefield Smith, Appellant, *vs.* United States of America, Appellee, No. 9209, April Term, 1947, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this eleventh day of April, A. D. 1947.

JOSEPH W. STEWART,

[SEAL.] *Clerk of the United States Court of Appeals for the District of Columbia.*

FILE COPY

Office - Supreme Court, U. S.
FILED
JUN 20 1947
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1235

DONALD WAKEFIELD SMITH,

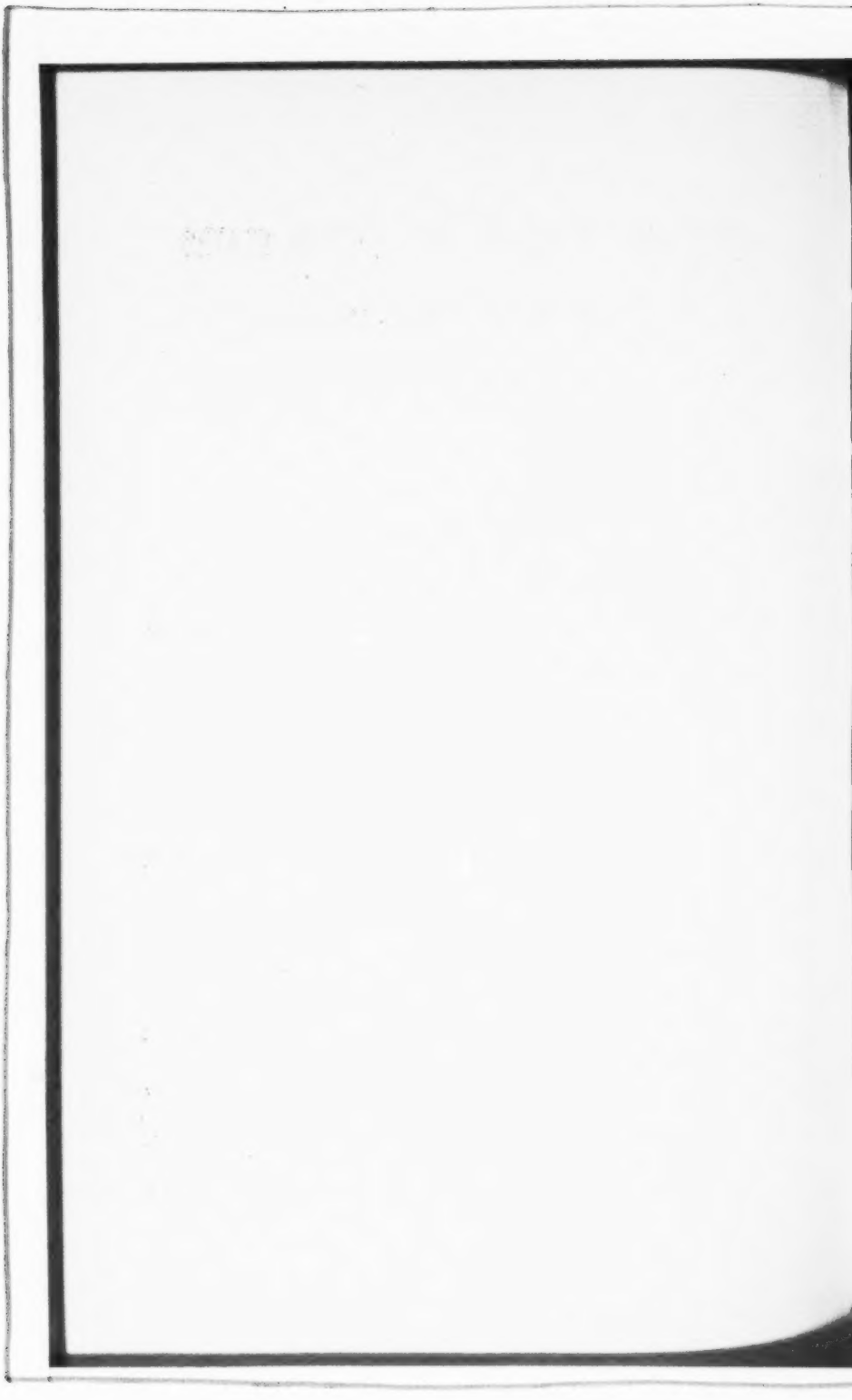
Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR RECONSIDERATION OF APPLICATION FOR WRIT OF CERTIORARI

WM. A. GALLAGHER,
WM. B. O'CONNELL,
Counsel for Petitioner.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1235

DONALD WAKEFIELD SMITH,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR RECONSIDERATION OF APPLICATION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petitioner herein, Donald Wakefield Smith, respectfully prays that the Court reconsider the petition heretofore filed in this cause, in which application was made for a writ of certiorari to the United States Court of Appeals of the District of Columbia, to review the judgment of that Court entered on January 13, 1947.

Counsel for the petitioner is aware that reconsideration by this Court in such cases is seldom granted; but cannot escape the feeling that, if ever there was a case which deserved such review, this is the one.

Since 1915, with the opinion and decision of the Eighth Circuit Court of Appeals in Isbell v. U. S. (227 Fed. 788,792) the rule of law laid down in that case has been followed in the Federal Courts. It was followed in the District of Columbia. In 1942, in Hammond v. U. S., 75 U. S. App. D. C., 397, 127 Fed. (2d) 752, the United States Court of Appeals for the District of Columbia, announced its adherence to the Isbell case

In the Circuit Courts of Appeal the doctrine of the Isbell case has fared in this manner:

In the Second Circuit, in 1922 and again in 1926, the same rule was approved and followed. (Nosowitz v. U. S. 282, Feb. 575; Romano v. U. S., 9 Fed. (2d.) 522.)

In the Third Circuit, in a series of cases running from 1926 to 1935, that Court approved the rule. (Grant v. U. S. 49 Fed. (2d.) 118; Ridenour v. U. S. 14 Fed. (2d.) 888; McLaughlin v. U. S. 26 Fed. (2d.) 1; Gaaceffo v. U. S., 46 Fed. (2d.) 852; Nicola v. U. S., 72 Fed. (2d.) 780; Paul v. U. S., 79 Fed. (2d.) 961.)

In the Eighth Circuit, in five separate decisions, the rule was approved. (Gargotta v. U. S., 77 Fed. (2d.) 977; Read v. U. S., 42 Fed. (2d.) 636; Salinger v. U. S., 23 Fed. (2d.) 48; Danaher v. U. S., 39 Fed. (2d.) 325; and Tinsley v. U. S., 43 Fed. (2d.) 890.)

Having established it in the Isbell case, supra, in 1915, the Tenth Circuit Court of Appeals, reiterated the rule in six later decisions. (Bishop v. U. S., 16 Fed. (2d.) 410 and 19 Fed. (2d.) 224; West v. U. S., 68 Fed. (2d.) 96; Leslie v. U. S., 43 Fed. (2d.) (1930); Sullivan v. U. S., 283 Fed. 865; Moore v. U. S.,

56 Fed. (2d.) 794; and Parnell v. U. S., 64 Fed. (2d.) 324.)

The rule that was thus so well-established was this:

"Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt it is the duty of the trial judge to instruct the jury to return a verdict for the accused."

It was upon this rule that the counsel for petitioner, at the trial of this case in the District Court, relied. It was upon the basis of this rule that the Petitioner was advised as to his rights. It was upon this rule that the petitioner stood upon his motion for a directed verdict. And it was again on this rule that the appeal of this petitioner was taken.

The District Court repudiated the rule. (Record 2931-2932.) "I think it is a wrong statement of the law."

Upon Appeal, the United States Court of Appeals also repudiated the rule, which it had therefore followed; and the Court recognized that its decision rested squarely upon the doctrine announced. The Court also recognized that its opinion and decision was in direct conflict with the Circuit Courts of Appeal enumerated above.

So far as this petitioner is concerned there can be no doubt that if the trial Court had followed the correct rule of law it would have been compelled to direct a verdict in his favor. The only escape from this alternative was obviously to repudiate the rule and announce a new one. In the same measure, the United States Court of Appeals for the District of Columbia would have been compelled to reverse the judgment of conviction as to this petitioner, or announce a new rule of law for the District of Columbia. It did the latter.

No suggestion is made, either in the language of the District Court which tried the case, nor in the opinion of the United States Court of Appeals for the District of Columbia, that there was any escape from this alternative. Surely, of the factual

situation of the case had permitted, neither court would have undertaken to declare a rule of law, (so well established, so often relied upon, and so many times approved), to be erroneous and no longer applicable in the District of Columbia.

Elsewhere than in the District of Columbia the old rule still prevails. If this petitioner had been tried in any of the District Courts which fall within the Second, Third, Eighth and Tenth Circuits, he would have been acquitted by direction of the Court. If he had been tried in any District Court in the United States, there can be little doubt that the authority of the Circuit Courts of Appeal which had approved the Isbell case would have been followed, for it has never been successfully attacked. He was, it would seem to counsel, entitled to rely upon the decisions cited above where put upon trial in the District Court for the District of Columbia. The same doctrine had been approved already by the Appellate Court in the Hammond case; it was not a case of first impression in the District of Columbia.

It seems hardly fair to a defendant in a criminal case that a principle of law so well established should be discarded, without giving him the opportunity to prepare his defense upon the newly projected doctrine. Certainly petitioner's defense would have been quite differently presented had it been possible for counsel to be advised that a new rule of law was in the making.

The decision of the United States Court of Appeals for the District of Columbia leaves the law in this jurisdiction in utter confusion. Unless that confusion is dispelled in this case, it may be years before this jurisdiction will again be brought back in line with the overwhelming weight of decision and authority throughout the Federal Courts. Defendants tried in the District of Columbia will be tried under a rule diametrically different from the rule applied elsewhere. This Honorable Court has many times acted to correct such a condition.

To the above consideration may be added this:

Although the situation of the petitioner was radically different from that of the other defendants, both as to the short two months he was in any way connected with them;/as to the failure of the evidence to show any wrongdoing on his part or any knowledge of wrongdoing by others, and as to many demonstrated phases of the evidence, no part of the instruction given by the District Court to the jury differentiates between one defendant and another. There is no effort apparent to distinguish him from the others, nor to segregate the things that he did from the mass of things done or omitted by others who were charged. Such segregation would, we believe, have led to his acquittal. He was entitled to a charge as an individual defendant.

This Court so held in Kotteakas v. U. S., decided June 10, 1946., and on that ground that case was reversed. The record in this case is quite as lacking as in the Kotteakas case. Nowhere is there any safeguard for this petitioner against the unwaranted imputation of guilt from others' conduct, and from loss of identity in the mass. If opportunity were allowed petitioner, this and the resulting prejudice to him could be demonstrated from the record beyond possibility of question. The charge given was the blanket charge, condemned in Kotteakas v. U. S.

Upon the considerations recited, petitioner respectfully prays that this Honorable Court grant him a reconsideration of his petition for Certiorari, and issue the writ as prayed.

WM. A. GALLAGHER

WM. B. O'CONNELL,

Attorneys for Petitioner,

203 Union Trust Building,

Washington, D. C.

APPENDIX

Since the inception of this case, there has existed an apparent insensibility to the INDIVIDUAL Constitutional rights of the defendant Smith. The rule of law, as expressed by Mr. Justice Rutledge in this Honorable Court's opinion in the Kotteakos case (Kotteakos et al vs. United States, decided June 10, 1946)—"Guilt with us remains individual and personal, even as respects conspiracies,"—has not been followed and petitioner has been caused to suffer that "loss of identity in the mass" commented upon by the Court in the Kotteakos case. Shortness of time prevented the filing of a Reply Brief to the Government's Brief in Opposition to Petition for Writ of Certiorari for the purpose of bringing to the attention of the Court the many discrepancies contained in such Brief in Opposition and what are believed to be invalid inferences.

Had time allowed Petitioner to submit this Honorable Court a Reply Brief to the Government's Brief in Opposition to Petition for Writ of Certiorari, it would have been shown in answer to statements contained in the Government's Brief in Opposition:

> That the record is void of any clear and unequivocal evidence that Petitioner Smith ever at any time had knowledgeof any so-called "prospectus" or so-called "financial reports" or was present at any time when such alleged "prospectus" or "financial report" was alleged to have been given to any person. (R. 1818; 2069; 1374, et seq; and throughout record)

> That Petitioner *did* contribute and is the only person shown to have contributed to the treasury of Engineers' Group, during his very brief tenure of only approximately eight weeks, to the extent of at least $2000.00 and that the amount of at least $1000.0 is still due and owing to him (R. 1499; 154, et seq.).

The record contains no evidence that Petitioner was a participant in or had any knowledge of any conferences pertaining to the Glenwood Range Company, Taunton, Massachusetts, (R. 1018, 1813; 1044, 1046.).

There is absolutely no evidence that the conference of November 28, 1941, alleged to have been had with John Hamilton of the Forse Corporation concerned or was in any way identified with Engineers' Group and, in fact, the record is clear that the conversation recited by the witness Hamilton was at Hamilton's solicitation as "a request for information on his (Hamilton's) part (R. 1369-1973) and Hamilton testified that Smith never even mentioned or recommended Engineers' Group at any time nor did Smith make any recommendation at any time to him (Hamilton) or to anyone in his presence (he testified he was present at all conferences which concerned Forse Corporation) concerning Engineers' Grop, who was connected with it, or what they could do. (R. 1373-1378)

The record shows that, at the time of the alleged conferences which Fuller had in Chicago on December 6, 1941, the Petitioner was then in Chicago in connection with business of a personal nature entirely divorced from that of Engineers' Group or Fuller and that he was not then in any manner identified or connected with Engineers' Group and had nothing to do with either such Group or with Fuller. (R. 2148-2149; 2152-2155: in addition to the testimony of Hamilton, supra.)

It appears quite significant that the Government counsel, in their Brief in Opposition to Petition for Writ of Certiorari, emphasize and almost entirely rely upon conferences alleged to have been had by Petitioner with five named individuals, none of whom, as the record clearly shows, ever did business with the Engineers' Group. The record establishes that, in every instance, the statement which Petitioner is shown by evidence to have made

to each and every such person *WAS THE TRUTH*. The record is clear that Petitioner never at any time solicited any person and that any conferences he had were upon the solicitation of such others. The record is clear and unequivocal that he never at any time knowingly made any misrepresentations of any character to any persons and that, without exception, he suggested an independent investigation and supplied pertinent references. In any instance where Petitioner is alleged to have stated that engineering services were available and could be supplied, *IT WAS THE TRUTH*. (R. 1098; 1288-1289; 1257-1258; 1821; 1798, et seq.; 1829; 1809; 1847-1848-1850-1853-1857; 1864; 1868-1873; 1859; 2671; 2674; and 2687-2688, to mention only a partial reference to the record) Wherever Petitioner is alleged to have stated to any person that contracts were made available to so-called "customers" *IT WAS THE TRUTH*. (R. 847; 851-852; 879-880-883; 914; 971; 973; 986-991: 996: 998: 1001: 1008; 1020; 1098; 1103; 1265; 1259: 1270-1271: 1289: 1335; 1337; 1852, et seq.; 2690, et seq. and throughout the record).

With specific reference to the testimony of the five named persons mentioned in the Government's Brief in Opposition, none of whom were customers of Engineers' Group, the record shows:

> WILLIAM HAYS FORSTER—the statement alleged to have been made by Petitioner to Forster that Engineers' Group "had obtained contract for another company" (to quote from the language of the Government Brief) *WAS THE TRUTH* (R. 1020 and 1103—testimony of Malcomb Leach of Glenwood Range Company).
>
> WALLACE W. DELANEY—the record is clear that DeLaney solicited Petitioner and that he did not enter into an agreement with Engineers' Group. The alleged statement of Petitioner that the so-caled Group "would train employees for new type of work" (again quoting from language of Government's Brief) *WAS THE TRUTH* (R. 1863-1873, et seq.).

DONALD MacGREGOR—the record clearly shows that the alleged representations to this witness were made by Fuller and NOT by Petitioner and that, in fact, Petitioner made no statement to this witness regarding "the officers, engineers or persons connected with Engineers' Group" nor is there any clear and unequivocal evidence that Petitioner said anything whatsoever to MacGregor at any time regarding Engineers' Group (R. 2156-2157). MacGregor did not enter into any agreement with Engineers' Group (R. 1984) and, at the time of the alleged conference, Petitioner was not even identified or connected with Engineers' Group (R. 2149).

LELAND B. SMITH—the only testimony as to any conference had with this witness, who was the president of Apco-Mossberg Company, was allegedly one in which Fuller, Underwood and Petitioner were alleged to have been present in which *only* "the *possibilities of the sale* of the Company" were alleged to have been discussed. Underwood, the President of Engineers' Group, was a defendant acquitted by the directed verdict of the Trial Judge. The record irrefutably establishes that the witness Smith testified that he met "*a* Mr. Smith" and would not recognize him" (R. 2449) and that he did not remember anything such "a Mr. Smith might have said (R. 2454). The record is absolutely void of any evidence that Petitioner ever at any time made any representations to this witness regarding any character of agreement or contract, or that Petitioner had any knowledge of any discussions or representations by others in this connection. The use of language by Government counsel that—"giving the president to understand that the money was on deposit in a bank in New York"—(quoting from page 18 of Government Brief) is not supported by the record contrary to the record. The record shows that the witness was asked on direct examination the question—"had there been any discussion as to the ability of these gentlemen to pay for your plant?"—to which the witness testified

"NO THERE HAD NOT BEEN——" (R. 2454-2455). This witness did not and could not identify the Petitioner.

RALPH T. SCANTELBURY—again a failure on the part of the Government to state that this person solicited Petitioner and that he did not enter into any agreement with Engineers' Group. Scantlebury testified that he never discussed Engineers' Group with Petitioner (R. 2005) and that when he talked with Petitioner "the cards were on the table" (R. 1999).

Government counsel in the Brief in Opposition, claim that the record shows that "as treasurer, Smith was in a position to know the precarious financial position of Engineers' Group in December 1941 and January 1942" because "the bookkeeper testified that he told Smith 'any time he wanted to know, practically daily, how much money the books showed was in the bank' ". (Govt. Briefs, page 19) That Petitioner did not so "know" is irrefutably clear from the record by the very testimony of "the bookkeeper" that it was not until February 13, 1942 (two days prior to Smith's resignation) that he was able to give Smith a statement showing the condition of the finances of Engineers' Group (R. 1402) because Smith's predecessor, Everett Hurt, retained the records necessary to the preparation of a proper set of books which could disclose the "financial position" and which would show a proper book balance (R. 1402; 1481-1482; and 1488). In fact, the first books the company ever had were prepared upon the order of Smith (R. 1417) and Smith did everything he could to keep the records straight (R. 1506). There is no word of evidence that Smith had any knowledge whatsoever of the manner in which his predecessor, Everett Hurt, had functioned. Hurt, whose integrity apparently was not questioned by the prosecution, but who served from the inception of the organization to December 16, 1941, and was the first treasurer, was never indicted and, although subpoenead as a Government witness, was never produced to testify. Smith had shouldered over on him all of the conduct of his predecessor, although the record is clear that he very very definitely had no knowledge of such conduct. The

entire record is absolutely and entirely void of any evidence whatsoever that any moneys disbursed by Smith during his brief tenure as treasurer were for other than legitimate and proper business purposes and wholly consistent with the expressed intention of all parties who during his brief tenure in office entered into contractual understandings with Engineers' Group (R. 893-896; 986-991; 1303; 1307; 1291; 1296: 1229: 1303: 8307: 1354: 1357; 2665-2678; and throughout the record). The record is clear and unequivocal that Smith never at any time during his brief tenure as treasurer either knowingly or intentionally issued any checks creating overdrafts (R. 1402; 1481-1482; 1488; 1492; 1493; 1498-1499; 1507; 1665; 2698-2699: 2700: 2702, and throughout the record); that any overdrafts were not within his knowledge but resulted from circumstances wholly beyond his knowledge or control, as predicated upon the believed assurances and actions of James Fuller, the Executive Vice-President and recognized active head of Engineers' Group, Inc. (R. recited supra).

Government counsel, in the Brief in Opposition to Petition for Writ of Certiorari, creates the inference that Petitioner "was in a position to know that contracts had not been *obtained* as promised," as "Smith wrote checks representing some of knowledge whatsoever of any contracts, agreements or understandings with any persons or companies who may at any time have made any agreements with Fuller or Engineers' Group the deposits that were returned to customers." No evidence of any character whatsoever was produced that Smith had any in connection with any." Smith never at any time during his brief tenure as treasurer was shown to have issued any check of Engineers' Group which could even remotely, from the evidence, indicate that he was "in a position to know that contracts had not been obtained as promised," (quoting from Government Brief—page 20). In this connection, Government counsel refer to several Government Exhibit (Gov. Ex. 48 and 87) which *patently* establish beyond any doubt whatsoever by their very language that they did *not concern* and *were*

not concerned with any "contracts". The check alleged to have been issued to Schweers & Smith purely involved a loan accommodation to such a company which was to be returned "within a few days" (Govt. Ex. 87) and that alleged to have been issued to J. W. Bishop Co., which the record clearly establishes was not even deposited until after Smith's resignation, was purely an accommodation (Govt. Ex. 48). Both Government Exhibits 48 and 87 are set forth in full in the Appendix, pages 34 and 35, to Petitioner's Reply Brief, attached hereto, to be considered as a part hereof, and specific reference thereto is made on pages 12 to 14, of such Reply Brief. The record is entirely void of any proof that Smith had any knowledge of the purpose for which such checks were issued and the only knowledge that could possibly be imputed to him was the very purposes expressed in the transmittal letters, written by Fuller, introduced as the above recited Government Exhibits. The Petitioner had no knowledge whatsoever of any "construction contracts" or any matters in connection therewith is inherent in the verdict as to him by direction of the Trial Judge and the Jury in connection with all Counts of the Indictment which had to do with such alleged "construction contracts".

In the Brief in Opposition (pages 28 through 35) the prejudicial affect upon the substantial rights of the Petitioner by the exclusion from evidence of twenty exhibits is discounted. The importance of these exhibits in establishing Smith's good faith and the absence of his part of any fraud or misrepresentation cannot be so summarily dismissed. The United States Circuit Court of Appeals for the District of Columbia, in stating in its decision—"We think that if the exclusion of these exhibits had affected the substantial rights of Smith, the action of the court might have constituted reversible error" (CCA Opinion, page 12), even commented that Smith Exhibit 19-A DID throw light on Smith's good faith and its exclusion WOULD HAVE affected his substantial rights "but the author of the letter was on the

witness stand during the trial and counsel had full opportunity to draw from him the full measure of his exoneration of Smith." The Circuit Court, therefore, denied reversible error *only* upon counsel having "full opportunity" of cross-examination. The record not only does not permit of any inference that counsel for petitioner was permitted such cross examination but definitely and irrefutably establishes that he was denied the right of such cross examination. The Court of Appeals admits this fact in stating that the Trial Judge "would permit a witness to identify a document while he was on the witness stand, *although he would not let counsel for Smith pursue the matter beyond that point during the course of cross examination,*" (Opinion, page 11). This Exhibit of itself patently exonerated Smith completely, as an expression by one of the so-called customers of Engineers' Group. Its favorable effect upon the jury, had it been admitted in evidence, unquestionably would have been tremendous and the action of the Trial Court in denying its admission constituted reversible error. The comment of Government Counsel in its Brief (page 34) that this witness (Anderson) "was not one of the witness who implicated Smith—he never received any communication from Smith about his contract with the Group" is quite revealing at this late date since Smith stands CONVICTED on Count Thirteen of the indictment on the testimony of this witness. In fact, the Record is clear that Smith never wrote any communication to any persons. Smith Exhibit 15 represents the *only* audit which Smith ever received of the books of Engineers' Group and is in the auditor's own handwriting and delivered to Smith only two days prior to his resignation, was of tremendous importance to the substantial rights of Smith, particularly, since such audit did not contain any statement as to the state of the finances during the incumbency of the former treasurer, Everett Hurt, and, along with the testimony of the auditor (Davis—R. 1402) served further to establish Smith's lack of knowledge of anything that occurred prior to December 17, 1941, or the state of the finances of the organization.

Other Exhibits, excluded from evidence, not only patently

confirmed Smith's good faith but confirmed his position that insofar as the records of Engineers' Group disclose, and so far as he knew, contracts for production were being negotiated and submitted, that engineering services were being rendered, and legitimate expenses were being incurred. In this light they would have been weighty evidence had their use been allowed and Petitioner should have been entitled to their benefit. The exclusion of these Exhibits very vitally affected the substantial rights of Petitioner.